

**MARINE MAMMAL PROTECTION ACT
AUTHORIZATIONS**

HEARING
BEFORE THE
SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT
OF THE
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
ONE HUNDREDTH CONGRESS
SECOND SESSION

ON

H.R. 4189

**TO AUTHORIZE APPROPRIATIONS TO CARRY OUT THE MARINE
MAMMAL PROTECTION ACT OF 1972 FOR FISCAL YEARS 1989
THROUGH 1993**

MAY 10, 1988

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MARINE MAMMAL PROTECTION ACT AUTHORIZATIONS

TUESDAY, MAY 10, 1988

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON FISHERIES
AND WILDLIFE CONSERVATION AND THE ENVIRONMENT,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The subcommittee met, pursuant to notice, at 1:37 p.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds (chairman of the subcommittee) presiding.

Present: Representatives Studds, Carper, Anderson, Hughes, Clement, Young, Schneider, Saxton, and Miller.

Staff present: Jeffrey Pike, Gina DeFerrari, William Stelle, Joyce Sacco, Lisa Murray, Tom Laverty, Jim Hoff, Lori Williams, Jim McCallum, Rod Moore, Tom Melius, and Kelly Faulkner.

STATEMENT OF HON. GERRY E. STUDDS, CHAIRMAN, SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

Mr. STUDDS. The Subcommittee meets today to begin the process of reauthorizing the Marine Mammal Protection Act of 1972.

The Act has proven itself to be one of the Nation's premier conservation laws because of the strength and breadth of its commitment to protecting marine mammal populations. While doing that sounds simple, it has not proven to be at all. The Act imposes a moratorium on the taking of marine mammals and carves out a set of exemptions pursuant to a series of complex procedures. It covers such subjects as Alaska native harvests, tuna fishing and dolphins, import prohibitions and the use of marine mammals for public display and education.

One of the major issues for the reauthorization relates to the incidental take of marine mammals by foreign and domestic fishermen. While the Act prohibits the taking of marine mammals that are considered depleted, the National Marine Fisheries Service may allow for the taking of other marine mammals if it can be shown that the taking will not diminish their stocks below an optimum level.

Recent judicial decisions have revealed the conflict between marine mammal protection, our own ignorance and the need to fish. Two courts have blocked a permit for the Japanese salmon fishery off Alaska because NMFS was unable to muster the scientific data to demonstrate that the fishery would not harm certain marine mammal populations. Because the Service has made firm

population estimates for only a few species of marine mammals, the court action has effectively stalled its permit process.

I am aware that representatives from environmental and fishing organizations have held a series of discussions seeking solutions to these problems. Their goal, we are told, is to find ways to allow our fishermen to fish without compromising the protections of the Act. I commend those involved for their efforts and I am looking forward to reviewing their suggestions as we proceed today and in the days to come.

Before I go on, does the gentleman from Alaska have a statement?

**STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE
FROM ALASKA**

Mr. YOUNG. Mr. Chairman, I compliment you on holding these hearings. This is a very important issue to the State of Alaska, and of course, the Nation, and the marine mammals themselves.

I have some reservations about how the Act has been implemented. We do have conflicting interests, as we all know. And I do commend those people that have worked for a solution. And that solution is expensive. I've read it, and that has to be taken into some consideration. But it is a solution. It's a step forward.

I would suggest also, though, that it's important we recognize that that agreement is between two interest groups within the United States. I think it's very important as we mark up any legislation, if the agreement is to be implemented, it has to in fact be in a position to make sure that any foreign fishing interests, as you just mentioned in your statement, be required to follow the agreement, or they are not allowed to fish in the area of our waters.

So again, I compliment those who have worked on it, and again, Mr. Chairman, compliment you for these hearings.

Mr. STUDDS. The gentleman from California?

**STATEMENT OF HON. GLENN M. ANDERSON, A U.S.
REPRESENTATIVE FROM CALIFORNIA**

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased that you have scheduled today's hearing on the reauthorization of the Marine Mammal Protection Act.

As the original author of the Act, I obviously support its reauthorization. Accordingly, I am a co-sponsor of H.R. 4189, which would reauthorize the Act for another five years.

I believe the Marine Mammal Protection Act has played an important role in protecting and enhancing marine mammals. At the same time, I think the Act has given our commercial fishermen the flexibility they need to make a living. I think each of these objectives is no less important than the other. Therefore, as we markup H.R. 4189, we must make sure that we enhance the protection of marine mammals and at the same time, ensure the continuation of a viable commercial fishing industry. This balance is essential.

I look forward to hearing from our witnesses today.

Mr. STUDDS. I thank the gentleman.

Mr. STUDDS. The members of the first panel, of whom there are five, will please come to the table.

Meanwhile, if there are people in the audience who are unable to find a seat, you're perfectly welcome to sit in this lower tier, if you'd like to, especially anybody who needs to write.

If we could have the members of the first panel come forward, we'd appreciate it.

I understand that each of you has given a solemn oath to confine your oral statement to no more than five minutes. All of you will have your written statements appear in their entirety in the record. I thank you, on behalf of the Subcommittee, for your willingness. I know it's difficult, especially in matters that are both important and complex, to condense remarks.

The House is in session. There is a chance we'll be interrupted by votes, and it's important that we do our best to hear from everyone.

We will proceed with each opening statement in the order in which you appear on the witness list. And that means our first statement will be from Mr. Bo Bricklemyer, Counsel, Ocean Ecology, Greenpeace.

Mr. Bricklemyer, welcome.

STATEMENT OF BO BRICKLEMYER, COUNSEL, OCEAN ECOLOGY, GREENPEACE

Mr. BRICKLEMYER. Thank you.

Good afternoon, Mr. Chairman, members, staff, ladies and gentlemen. My name is Bo Bricklemyer. I am counsel for Ocean Ecology at Greenpeace, and am appearing today on behalf of Greenpeace and the over 20 conservation and animal rights groups that comprise the Marine Mammal Protection Act Reauthorization Coalition. As we have submitted rather extensive written testimony, I would like to summarize our positions now.

I would begin by thanking you for inviting us to share our views. We hope that they will be useful in reauthorizing a strong MMPA. Our community views this law as a progressive, critical piece of environmental legislation, long overdue when it was passed in 1972, to remedy the exploitation of these animals. And while in the subsequent 16 years some species, such as California sea lions and gray whales have staged recoveries, other have not. Northern fur seals, for instance, are estimated to be declining at the rate of five to seven percent per year. The number of Steller's sea lions observed at hand outs in Alaska has decreased 52 percent since 1960. The harbor porpoise, a number of tropical Pacific dolphins, and many great whales are still in serious trouble. This is not a time to weaken the MMPA, but an occasion to renew our Nation's commitment to marine mammals and to the protection of the health and stability of the marine ecosystem upon which they depend.

Foremost in the minds of many is the status of marine mammal incidental take permits for domestic commercial fishermen. The current process for permitting such takes, as implemented by the National Marine Fisheries Service, has numerous problems. While the permitting process is designed to be driven by science, we find that good information is too often lacking. There are reasons for

this: one, permits are issued to a broad class of fisherman, without accounting for the number and diversity of gear types within the class; two, although regulations require reporting by individual fishermen, participation has been very limited and there appears to be no effort to compile or analyze on a timely basis what data is reported; three, the permits establish annual quotas on the takes of each species, but without fisheries specific reporting, without monitoring, and without analysis of the limited data which is reported, the actual level of incidental mortality of marine mammals is largely unknown; and four, research programs have been limited in both funding and scope and have added relatively little new information in this regard. Therefore, without the knowledge of the takes in specific fisheries, and without independent research data, the information upon which to base the waiver of the moratorium to allow incidental takes or to trigger mitigating efforts—should these pose harm to the subject species—does not exist.

These failings, coupled with the *Kokechik* decision in the Dall's porpoise case and the fact that all general and small take marine mammal permits expire at the end of 1988, led to a series of meetings between industry—the tuna industry has not been involved—and conservationists beginning in late 1987. For the past month negotiations have been proceeding almost continuously. We feel both sides have worked hard, bargained in good faith, and made concessions important to reaching our mutual goals. Those are to continue the protection accorded marine mammals in the United States while assuring that our commercial fisheries which have interaction problems will be able to operate while we gather needed information through a program with an adequate safety net.

The amendments recommended in the document which you have received, would accomplish our goals by establishing the following: a three year limited exemption to the moratorium to allow for incidental take of small numbers of marine mammals for which OSP cannot be determined or for species which are depleted; an industry-wide education program; a revised and invigorated reporting system; a verification system including a MMPA/MFCMA-funded living marine resource observer corps; a new data analysis system; a research program focused on specific problems; recovery plans, habitat protection zones and mitigation mechanisms; and definite timelines and procedures to assure that population status determinations for depleted designation are open, complete and efficient.

At this point we have an agreement with but one caveat. That is the question of whether fishermen should be allowed to intentionally kill Steller's sea lions, an animal that is almost certainly depleted, that is declining at a rate of over five percent per year, and for which NMFS published Friday a notice to propose that it be formally designated as depleted. At this point we can see no rational resource management principle that will allow us to condone such a killing; however, we are seeking other ways to mitigate interactions between Steller's and fishermen.

Moving briefly to other areas of interest to the consortium, we support an amendment to the Act to clarify Congressional intent that permits for display assure that the captivity will serve educational purposes; and that scientific permits be issued only when the

research truly expands useful knowledge and that such takings shall be accomplished in the most humane manner possible.

We must oppose any attempts on behalf of the Administration or the native community to allow for the sale of fur seal skins taken as a result of the subsistence hunt on St. Paul and St. George Islands. We actively support, however, all efforts to move the Aleut economy away from its historic dependence on sealing.

Lastly and importantly, as committed as we are to reaching an accord with commercial fishermen over their incidental takes, we are equally committed to ending the intentional takes of dolphins by the purse seine tuna fleet. Nationally and internationally, the practice is killing many tens of thousands of cetaceans each year. The coalition is a part of a world-wide effort in this regard. A formal motion for resolution has been introduced in the European Economic Community to seek an end to setting on dolphin through market pressure. We will work hard to see that our national foreign take comparability regulations are truly comparable and that they go into effect immediately, not in 1991; that domestic research, mandated by Congress in 1981 and never begun, be initiated in order to demonstrate that tuna fishermen do not need to set on dolphin; and that, ultimately, the practice is phased out over the next four years. We believe that it is truly anachronistic, as well as unnecessary, to kill these animals in order to get tuna fish in a can.

[Showing picture of a common dolphin and a can of tuna.]

Thank you.

[The prepared statement of Mr. Bricklemeyer and additional written testimony can be found at end of hearing.]

Mr. STUDDS. Thank you very much, sir.

Next we'll hear from Mr. Michael Bean, Chairman of the Wildlife Program for the Environmental Defense Fund.

Mr. Bean.

STATEMENT MICHAEL BEAN, CHAIRMAN OF THE WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND

Mr. BEAN. Thank you very much, Mr. Chairman.

It's a pleasure to be here. I'll be very brief in summarizing my testimony. There really are only two points I wish to emphasize.

First, with respect to the agreement that Mr. Bricklemeyer described a moment ago, among environmental representatives and fishing industry representatives. I want to commend Mr. Bricklemeyer, who really did the yeoman's work for the environmental community on this, and the individuals at this table, as well as others from the fishing industry. All of us, I think, made a very good faith effort to resolve our differences and find constructive solutions to these problems.

I appreciate Mr. Young's remark that he recognizes this as a step in the right direction. And I hope that all the members of this committee will work in that spirit to try to find a way to make this agreement among these parties become an effective and operative law.

The other point I want to emphasize returns to Mr. Young's opening remarks, in which he emphasized the need to make sure

that foreign fishermen live by the rules, I think he put it, that apply to American fishermen. I share that sense, but I want to bring to this subcommittee's attention the fact that that was also the objective of this subcommittee four years ago when it amended this Act with respect to the tuna/porpoise problem. There, the intention of the subcommittee was to make sure that the U.S. market not be available to foreign nations catching tuna by means of setting purse seines on porpoises, unless those foreign nations had programs comparable to the U.S. program to protect porpoises, and unless those foreign nations were achieving rates of porpoise mortality that were comparable, that is as low as, the rates of the U.S. fleet.

Despite the efforts of this committee to enact into law—the successful efforts of this committee to enact into law a requirement to do exactly that, in fact, nothing has really changed in the real world. And in fact, foreign nations continue to export their tuna to the U.S. and take advantage of the U.S. market even though their rates of porpoise mortality are acknowledged by the Government to be roughly four times the rates of U.S. tuna vessels.

I can't pin the blame entirely on the foreign fleets, because they haven't been required by our Commerce Department to do anything differently. In fact, in regulations that the Commerce Department issued only about a month or so ago, the Commerce Department has postponed until 1991 any requirement that foreign fishing fleets achieve the comparability that you gentlemen required be achieved in 1984.

So I want to echo Mr. Young's opening remarks and point out that your insistence that foreign tuna fishing nations play by the rules that apply to the U.S. fleet has not happened yet. And only if this committee makes unequivocally clear that it is unwilling to wait until 1991 in order for the Commerce Department to do what you directed it to do in 1984, will they have any incentive to begin doing that.

Thank you very much.

[The prepared statement of Mr. Bean can be found at end of hearing.]

Mr. STUDDS. Thank you, sir.

Next, Mr. Dayton Alverson, Managing Partner of Natural Resources Consultants.

Mr. Alverson.

STATEMENT OF DR. DAYTON ALVERSON, MANAGING PARTNER, NATURAL RESOURCES CONSULTANTS

Dr. ALVERSON. Thank you, Mr. Chairman, members of the committee, staff.

My name is Lee Alverson. I'm managing partner of Natural Resources Consultants. I'm speaking today on behalf of the significant portion of the fishing industry involved in negotiations with the conservation community.

Our joint objectives have been to promote a legislative change in the MMPA which would provide for the continued improved conservation of marine mammals, while at the same time allowing im-

portant commercial fishing activities to continue their operations with limited impact.

Mr. Chairman, I have submitted a rather lengthy paper outlining the views of a major portion of our fishing industry, and on the characteristics of the agreement that has been hammered out between the conservation/environmental groups and the fishing industry over the past month.

We as of this morning agreed upon a comprehensive program that includes goals, education, data collection and analysis, incidental catch verification, and the establishment of a industry/conservation group which will evaluate the performance occurring within this program on a year-by-year basis. In achieving this agreement, both groups were forced to retreat from their original positions, but in a spirit of compromise and in recognition of the other sides legitimate concerns.

A copy of the agreement with details of the five point program has been provided to the committee, and it is not my intention to elaborate on the specifics of the essential program components. A few points, I think however, are important to the understanding of the agreement and the views of the fishing industry, also their commitments.

First, the industry has agreed to fund and carry out an extensive education program which will enlighten fishermen of the goals and objectives of the MMPA, the consequences to fisheries of the continued declines of important marine mammal populations, and the importance of the data collection and reporting as it relates to establishing a base to understand the marine mammal and fish interactions.

Second, the industry has also agreed to secure the funds for disseminating collection and data compilation for a newly proposed information retrieval system that deals with the fish/marine mammal interactions.

Thirdly, both sides have agreed to establish a scientific group which would assist Government in the analysis of the status of stocks and interpretation of their trends.

As a part of our overall program, there is a verification process which would include a major observer program on the specific designated fisheries limited to the contiguous West Coast States and Alaska. This program, which is felt essential by both parties to the agreement, will provide information which will be needed to the management of the important marine mammal and fisheries resources inhabiting the Northeastern Pacific region, including the Bering Sea.

Mr. Chairman, I've been involved in fisheries management and science for over 30 years, and I recognize that observer programs are at times controversial. Nevertheless, the observers program is in our point, needed for the collection of the information base required to resolve growing user group conflicts that have arisen as a result of the inherent goals of the Marine Mammal Protection Act, and that of the Magnuson Fisheries Conservation and Management Act, and also in integer conflicts that are emerging under the councils in various regions, particularly in the Northeastern Pacific.

Each of the various goals of the Act in its own way has been designed to meet specific conservation and/or user group goals, but

are different in terms of relating to different sectors of the ocean's living resources. Achieving the goals of the MMPA and the MFCMA are not obtainable without a statistical and scientific data base. From my prospective, failure to provide the funding required for the research and for the observer program will only increase the conflicts between the various ocean user groups, and Congress will be continually plagued with proposals for solutions that are based on emotional interpretation of what is going on in the oceans adjacent to our country.

Mr. Chairman, the goals and conclusions of the agreement contained in the various elements which will—some of the goals will not be popular with our representative groups on both sides, but were essential toward reaching our common goals, and to obtaining an agreement. We have not yet, as pointed out before, resolved the issue that's involved in intentional killings of Steller's sea lions, but all other components of the agreement are intact. Gentlemen, it is my hope that you will study carefully our proposal, and develop the appropriate legislative language and funding commitments needed to achieve its goal.

In conclusion, I would like to compliment the environmental community and the fishing groups involved in this negotiation. They have reached a milestone in understanding each other's concerns in the oceans. They have put forth a proposal that will develop the types of information needed to resolve various ocean use conflicts which will plague us over the next several decades.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Alverson can be found at end of hearing.]

Mr. STUDDS. Thank you, sir.

Mr. Henry Mitchell, Executive Director of the Bering Sea Fishermen's Association.

Mr. Mitchell.

STATEMENT OF HENRY MITCHELL, EXECUTIVE DIRECTOR, BERING SEA FISHERMEN'S ASSOCIATION

Mr. MITCHELL. Mr. Chairman, my name is Henry Mitchell. I'm the Executive Director of the Bering Sea Fishermen's Association. In addition, I'm on the Executive Committee of the United Fishermen of Alaska, which is an organization representing 20 fishing organizations, not only in Alaska, but Washington State, Oregon, and also with California members.

The Bering Sea Fishermen's Association represents primarily Native Alaskans, primarily Upic Eskimos, who fish in the Bering Sea in near-shore fisheries for herring and salmon.

We have participated in these industry negotiations with the National environmental groups for many of the reasons that Mr. Alverson has pointed out. But we would like to point out that marine mammals are an important part, not only of the environment of Western Alaska, but they also are an important part of the subsistence, lifestyle, and culture of many of our members.

I'm not going to go into the topics that Mr. Alverson has dealt with, but I would like to point out that we feel that it is significant that our organizations will participate in a very extensive educa-

tional program, which we feel will lead to a better understanding by our fishermen of the importance of dealing appropriately with the marine mammal situation we have today. And also in providing better information to the managing agencies.

Additionally, as you will notice in the agreement, it was the desire of those at the table, including the National environmental groups, that this provision only apply to U.S. harvesters, much as in the 1972 Marine Mammal Protection Act, the small take provision, only applies to U.S. harvesters. And I think that the reason for that was that there was general feeling that many of the foreign nations have not been very cooperative. They have very large fleets in some cases, for instance, the squid gillnet fishery of Japan operating in the North Pacific comprises over 700 vessels. We suspect that their take of marine mammals is very large. In order to treat them with equity, it would be necessary probably to have a very extensive observer program.

And this observer program, of course, as under the agreement would have to be one that dealt with all living marine resources. It would be marine mammals, sea birds, and fishery interactions. Anyway, we feel that if it is the will of Congress that the foreign nations be treated the same way, that perhaps the best vehicle to do that is to leave them out of this, and then to allow the State Department, through international negotiations as with the Japanese through International North Pacific Fisheries Commission, the opportunity for them to come forward and perhaps negotiate a separate protocol. We feel that that would be the appropriate response to deal with those issues.

Another thought that comes to mind is that in the case of these marine mammals, we have developed certain cap guidelines. And for the U.S. industry, which would include all the trawl fisheries in the North Pacific, and other fisheries, we had set a figure, I believe, of 50 fur seals as a goal. If in fact the Congress wanted this sort of thing forward, we would feel that certain caps should also be applied to foreign nations also.

Generally though, I think this is a very historic agreement, and I would hope that you would look at it carefully, and go forward and adopt it in total.

Thank you very much.

[The prepared statement of Mr. Mitchell can be found at end of hearing.]

Mr. STUDDS. Thank you, sir.

Mr. Richard Gutting, National Fisheries Institute.

Mr. Gutting.

STATEMENT OF RICHARD GUTTING, VICE PRESIDENT FOR GOVERNMENT RELATIONS, NATIONAL FISHERIES INSTITUTE, INC.

Mr. GUTTING. Thank you, Mr. Chairman.

I'm Richard Gutting, Vice President of the National Fisheries Institute. The Institute sincerely appreciates the opportunity to appear before you today.

For those of you not familiar with the Institute, it's a broad based trade association of some 1,100 companies engaged in all aspects of our industry. We have vessel operators and owners, proc-

essing plants, and those companies engaged in marketing and distributing products. We also have member companies scattered throughout the United States.

I, too, would like to make two points. The first has to do with the agreement that has just been completed. The Institute did have an opportunity to participate over the last few weeks in the extensive discussions that took place with the environmental community and the fishing industry. And while we sometimes got emotional, I think there was a sincere and collective effort on the part of everyone to stay on the merits and see whether we could work something out. I feel privileged that I had an opportunity to sit through those discussions. I think one of the very positive things that is going to come out of these discussions is a commitment on the part of everyone to continue this process, to sit down year after year, review progress and work together toward a solution. I think that kind of cooperative spirit is certainly welcome.

The agreement, as I indicated, has only recently been completed. In fact, I got a copy of it only about 30 minutes ago. So I have obviously not had a chance to review it. Our member companies on the West Coast, however, over the weekend did have extensive discussions, and they are, as far as I am aware, in support of this agreement as it's been presented to you. Unfortunately, our member companies along the East Coast have not had that opportunity. I'm going to have to get this agreement out to them and hear back from them before I can say what the position of the Institute is on this agreement.

The other point I'd like to emphasize concerns the East Coast. When we were asked to testify, we were asked to discuss what's been going on on the East Coast. In my testimony there are lots of statistics, and numbers and references to reports. I won't repeat them. I'd be happy to answer your questions.

Essentially, with regard to the Gulf of Mexico and the East Coast, none of the species of marine mammals which are involved in commercial fishing have yet been declared either endangered or threatened under the Endangered Species Act, or depleted under the Marine Mammal Protection Act. That's not to say that the National Marine Fisheries Service knows exactly how many animals are out there. It doesn't. It has not yet been in a position to make a positive finding about what the optimum sustainable population is. Despite that lack of information, for the past several years several groups on the East Coast have operated under the so-called small take exemption which allows U.S. fishermen to take small numbers of marine mammals incidental to commercial fishing provided there's a finding that that take has a negligible impact on the population.

In my testimony you will see detailed reports on the results, both in the menhaden purse seine fishery in the Gulf of Mexico and Atlantic, and also in New England with regard to a series of studies that were made up there with regard to commercial fishing.

I would like to add something, however, at this point that is not in my testimony. I did refer to the trawl fisheries of the Atlantic in my testimony indicating that we have had periodic reports of takings of marine mammals in trawls. Apparently, for the last several years, U.S. observers aboard foreign fishing vessels have reported

that the foreign fishing vessels have been taking marine mammals. We were informed of the numbers about a week or two ago. And those are indicated in my testimony.

Apparently last week the National Marine Fisheries Service advised both the U.S. vessels and the foreign vessels operating in the mackerel fishery that any future marine mammals that were taken would be illegal, that a permit could not be issued, and that therefore everyone should be advised that they were facing penalties. The result of that, Mr. Chairman, is that that fishery shut down. The U.S. boats have gone home. As I understand it, the foreign vessels have left the area as well. In the past this fishery has operated under permits that were issued to the foreign partners covering both the U.S. and foreign vessels. Apparently National Marine Fisheries Service officials are concerned about their ability to issue permits in the future, and that legal ambiguity has meant that the mackerel fishery has shut down.

And with that, thank you very much.

[The prepared statement of Mr. Gutting can be found at end of hearing.]

Mr. STUDDS. Thank you, sir.

Thank you all. Obviously if you've seen it for 20 minutes, our staff, apparently, received it last evening, and we're not in a position to ask knowledgeable and detailed questions at this point. We've some homework of our own still to do.

As I understand it, the proposed agreement relies on education, on research, and on management. And that the industry at its own expense undertakes to implement a three-year education program. Is that the case? How ambitious is it? How expensive would it be, and how might it be funded?

Anyone or ones.

Mr. ALVERSON. Mr. Chairman, I must admit that nobody has sat down and tried to put a specific number in terms of the number of dollars that would be involved in the education program.

What we have committed is that every association involved in this discussion would have the responsibility of developing information that would be sent out to their membership. It is our intent to develop a brochure in concert with the environmentalists that would be distributed to all members of the fishing industry. We would use all of the normal industry gathering points, such as council meetings, government/industry meetings, etc. in disseminating the educational material.

A program of this type has been tried by the longliner vessels. We see a similar effort expanded to each of the different types of fisheries, e.g., salmon gillnet fisheries, herring fisheries, trawl fisheries, and all the coastal fisheries. It really hasn't been structured in terms of the specific character of the program, but I can guarantee you it will be extensive and there will be a significant cost associated with it.

Mr. STUDDS. Anyone else want to speak to that?

Mr. Mitchell.

Mr. MITCHELL. Mr. Chairman, I might add, part of that would be trying to get the information back from fishermen.

In the case of Western Alaska, many of our village fishermen would lack the ability in many cases to fill out these forms. So in

the case of an organization like ourselves, we would have pledged that we would be in the position of going to the various villages at the end of the season to make sure that people took these verification forms and filled them out and sent them back in to the appropriate agencies, so that the various tallies on what marine mammal interactions or takes that took place would be done.

We've done that also over the years in terms of trying to get people to comply with Internal Revenue Service forms. You know, in many villages the mail comes, and a lot of individuals don't really know what it is and it sits in a shoebox.

Mr. STUDDS. It doesn't work in villages in Massachusetts either. Don't worry. [Laughter.]

Anyone else want to respond to this general subject?

Mr. Gutting.

Mr. GUTTING. Mr. Chairman, I think there are two types of programs we have in mind. The first is a very basic one. And that is getting information out to the fishing groups themselves that there is an Act, that there are procedures and forms and things that need to be done, and getting them into the program. I think that's our first objective, to get fishermen into the program, to get them registered, to get them filing reports. And I think we can do that best through the trade associations, through the industry trade press, and through the meetings that we have.

"The second kind of educational program is once you get fishermen into the program, being sure that they are filling out those reports, that the incidents that are reported are dealt with. We've had some experience running such a program on the East Coast. One of the things we've done in National Fishmeal and Oil Association, which is one of our divisions, is run such a program under the small take exemption. We've run this program for the past several years for about 80 purse seine vessels operating both in the Gulf and the Atlantic. It's a seasonal fishery. We sit down with the skippers at the beginning of the season, we pass out the forms, we pass out the guidebooks, how to identify marine mammals, review the procedures that need to be followed, and then send them on their way. At the end of the season we have a debriefing, talk about what happened, and fill out our final reports.

So it's a two-step process. Getting people in and then making sure once they're in, that they're active participants.

Mr. STUDDS. Okay.

Anyone else on that?

Mr. ALVERSON. Mr. Chairman, I just wanted to add, we've had some experience on this sort of thing with the marine debris program that we've carried out in the Pacific Northwest, and industry as an aggregate has probably spent close to \$100,000 in various aspects of that program. Although the debris program was directed largely at the fisheries of the FCZ, where the major problems were perceived, we think it worked extremely well. Many of the aspects of the program we have proposed for marine mammals would have similar characteristics.

Mr. STUDDS. Let me ask you the most obvious question of all, I suppose, is the ambitious observer program, which apparently is involved here. Who would like to tell us how much that will cost, and with some trepidation by whom it will be paid?

Mr. ALVERSON. Well, we of course have proposed, as a group, that the requirements of the two Acts and the National commitment to the two Acts are very broad in terms of the various user groups that they represent, and that the observer program to collect the information to achieve these Acts should be an obligation of Government.

We have in essence proposed——

Mr. STUDDS. Any particular government?

[Laughter.]

Mr. ALVERSON. I'll let you make that judgment.

Mr. STUDDS. That's what I thought you were going to say.

Mr. ALVERSON. I don't think this is as ambitious as it sounds. We have proposed a program of about 20 percent coverage on the trawl fisheries in the Bering Sea and on the Gulf of Alaska. The observer program on foreign trawl activities that deliver to JV's is already in place. We've suggested a similar program on the crab and the line fisheries, but these fisheries have very short seasonal duration periods.

So if you add up the number of observers, and look at man months of coverage, I suspect we're looking at something at the cost of 35 observers on an annual basis——

Mr. STUDDS. Thirty-five?

Mr. ALVERSON. Thirty-five, perhaps up to 40. We haven't really sat down and done this in detail yet, and the costs are going to be probably somewhere from \$2 to \$2.5 million.

Mr. STUDDS. Okay.

The gentleman from Alaska.

Mr. YOUNG. Thank you, Mr. Chairman.

I have a question of Mr. Mitchell first. For the record, you were suggesting instead of putting the foreigners under this bill, because of the comment of Mr. Bean, in fact, that in order to allow them to fish, they would have to go through the State Department with a protocol position with a request to fish, following the regulations that would be under this bill before they got a permit?

Mr. MITCHELL. No, I'm suggesting that that would be probably more appropriate in terms of, for instance, the Japanese, there is some concern about INPFC what its role is, how that relates, you know, to the health of fisheries not only in the North Pacific but the Bering Sea. It would be more appropriate, from our standpoint, that the observer coverage that many people feel it is necessary, not only on their direct salmon fleets, but also on their high seas squid gillnet and pomfret fisheries that that be accomplished through an international negotiation that would be a protocol amendment to INPFC.

But, of course, you know, it is your—you have the ability to set those guidelines. If in the interest of equity, you want them treated the same way that we want to treat ourselves through this agreement, it would necessitate if they came to the table—it would have necessitated that they would have at least 20 percent observer coverage on their fleets. Which in the case of the Japanese high seas gillnet fishery, that would probably be somewhere around 175 observers, which would probably be an appropriate number to determine what the living marine resource interactions and catches are

out there as far as marine mammals. Because we understand they're very extensive.

Mr. YOUNG. My big goal is to make sure that they don't have an advantage, after you went to all this work, over American fishermen. I think the gentleman is absolutely correct. In the tuna industry they've taken advantage, and because of our Commerce Department not enforcing the intent of this committee, that they are now abusing the law that was set forth by this committee, it applies only to our fishermen.

And I want to make sure when we write this legislation that they're covered one way or the other, so they're not allowed to do, I think, damage that's not called for once you've agreed to reach the stipulations between the two interested parties here. So we're going to need some help. We just saw this agreement—I doubt if any of you can really give me a full rundown on it, and as we write anything into a renewal piece of legislation, it has to be written into law. So we're going to need the participation from everybody at this table to make sure that we're on the same track that you thought you were on too.

I've got one other question for Mr. Bricklemyer. I was going along with your statement pretty well, and everything was following along, and then you had to throw a hooker, and it wasn't the can of tuna. It was the Pribilof Islands seal harvest and objection to processing or selling of any of the furs from that subsistence yield.

Would your group support a quota of processing those hides at all?

Mr. BRICKLEMYER. Well, my understanding of the coalition's position on this, is that they're not opposed to handicrafts made from those pelts.

Mr. YOUNG. See, that's the problem. You know, if we consume the flesh of 12,000 fur seals, you can only make so many yo-yos. And to me, not to have the total animal utilized, I think is hurting the intent of the Act. And not only this Act, the Subsistence Act. Subsistence means utilization.

And if you were to put a quota on the amount, and that would be a quota that would have to be worked out with the group, of what they do use. Now I've talked to some those members of that group, and to them, not to utilize those hides is a waste. But there's just so much they can do with them. Now what would be wrong with, in consultation with your group, of having a fixed quota?

Mr. BRICKLEMYER. Well, I can tell you the concern which has been expressed to me, and that is a concern of a harvest which is based upon subsistence, but which could have the problem of being driven by the sale of the pelts. That is, it could become the latter that is really causing the allocation to be made, instead of true subsistence needs.

Mr. YOUNG. But if the quota was set down in law, based upon consumptive figures, of consuming the flesh, can't you work out some kind of an agreement with your organization, and say that these furs should be utilized to the highest return?

Mr. BRICKLEMYER. Well, I would certainly be very willing to go back and discuss that with my organizations. But currently the position is as I have stated.

Mr. YOUNG. I understand that, but do you understand what I'm saying?

Mr. BRICKLEMYER. Yes, sir.

Mr. YOUNG. I think it's an awful waste, and they think it's a waste. I don't think you see the abuse that people expect. To them, though, they just can't use 10,000 fur seal hides, and the hides lay there in a pile and go to waste, and the meat is consumed. And to them it's wrong. It's something that they don't agree with. And in the old days they probably didn't utilize the hides to the fullest extent either, and now when there is a market for those hides, not to have the right to get the highest return on that specific amount of hides, they ask me why.

So take that back and consider it.

I have no other questions.

Mr. STUDDS. The gentleman from California.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. Gutting, I realize there is a lot of concern on the impact of NOAA's inability to assess the optimum sustainable population for the number of marine mammals within the Pacific Northwest fisheries. Now, will NOAA's inability to assess the OSP for the number of marine mammals have any potential impact on the fisheries in my area, say, off of Southern California?

Mr. GUTTING. Mr. Congressman, you've asked a \$64,000 question.

There's several questions that I wish if I were you, I could ask the next panel of witnesses.

Mr. ANDERSON. You could give me the questions, and I will.

Mr. GUTTING. Okay.

One is a legal question. Can the small take exemption under Section 101 apply in a situation such as you described? We have asked that question of NOAA lawyers. They have told us in a preliminary sort of way that they think it would be all right. But I would like to hear the agency say that as a matter of official policy.

The second question is, okay, if there is no legal bar would the circumstances apply, are small numbers involved? What is small numbers? Is there a negligible impact? What is a negligible impact? Only if you can make these findings, number one, not knowing the population status is okay; number two, small numbers are involved; and three, there is a negligible impact, can the exception apply and fishermen continue to operate under Section 101.

Those are three questions we don't know the answers to. I personally, and the Institute, are very hopeful that the agency will be able to make the right kind of findings and allow for the small numbers to continue to be taken under Section 101. But we don't have the answer right now.

Mr. ANDERSON. Thank you.

I would like any of you to respond to my next question. As you may know, the taking of marine mammals, as defined in the Marine Mammal Protection Act, is not limited to capturing or killing them, but includes harassment of the mammals as well. Do you believe that this definition is too broad?

Mr. BRICKLEMYER. I would like to say, Mr. Congressman, that we don't believe that it is too strong, and there are many reasons for it. For instance, from what we understand of the biology of marine

mammals, harassment may cause population problems if they are disturbed during times of mating, calving, pupping or nursing.

And that gets me, if I might, back to the initial question that you asked of Mr. Gutting, if you would allow me to regress for a moment.

Mr. ANDERSON. Surely.

Mr. BRICKLEMYER. And that is that in the proposal, which we have laid out here, and all too late gotten to you, the species which are taken, incidently, by fishermen in California, would come under this limited three-year exception. They would be subject to filing reports and participating in the education system, and would be allowed under this exemption to continue to fish, as long as they met the guidelines which we've established to allow us a sufficient safety net.

Mr. ANDERSON. My final question is perhaps for either Mr. Bean of the Environmental Defense Fund or Mr. Bricklemeyer of Greenpeace.

Do either of you believe that the Marine Mammal Protection Act should be amended to allow for the importation of marine mammals for propagation purposes?

Mr. BEAN. Well, sir, I believe that that isn't necessarily a bad idea. As you know, the Endangered Species Act currently has an exception that allows importation of endangered animals, not only for scientific research, as the Marine Mammal Act does, but also for propagation and survival of a species.

The Marine Mammal Act does not have a comparable exception to it. I think if it were possible to structure carefully such an exception so that it's purpose would be to encourage captive propagation of marine mammals where captive propagation is really necessary for the conservation of those, that that would not be an undesirable end.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from Tennessee.

Mr. CLEMENT. Yes, I have several questions.

Fishermen are currently required to report interactions with marine mammals incidental to fishing. How successful has this method of reporting been?

Mr. BRICKLEMYER. If I might I would like to respond to that.

We did a compilation of the records, which were available, which we have had some difficulty in even obtaining from the National Marine Fisheries Service, and depending on the gear type, the percentage of the fishermen participating in the fishery that bother to get the certificate of inclusion (which is free) ranged from a high of 70 percent in the trawl fleet, to a low of 20 percent in stationary gear categories. And then, of those, the percentage that bothered to report at the close of the season ranged from a high of 16 percent to a low of 2 percent.

So we have felt that it hasn't been very successful.

Mr. CLEMENT. I understand the National Marine Fisheries Service is currently undertaking an internal review of the display permitting process. How is the process proceeding?

Mr. BRICKLEMYER. Well, as you say, we have been told that a blue ribbon panel will be appointed to look at both display and scientific permits, to ascertain guidelines that they will then abide by,

because as the process is currently conducted, unfortunately the way it is done depends upon what was done in the permit that was issued last. And so each permit is in fact setting a policy.

We have met, as have members of other conservation groups, with the Protected Species Branch of NMFS, which is running this, and we're hopeful that it will move along promptly. At this point, I'm not sure where they are.

Mr. CLEMENT. When's this review going to be made public?

Mr. BRICKLEMYER. Well, I think that where they are right now is still trying to decide who is blue ribbon panel material.

Mr. CLEMENT. As you know the MMPA only authorizes the take and importation of marine mammals for scientific or public display purposes, and not for purposes of enhancing the propagation or survival of the species. Do you believe that the Act should be amended to allow for the importation of marine mammals for propagation purposes?

Mr. BRICKLEMYER. Well, I appreciate you asking that question, because I had hoped to respond to Congressman Anderson's question in that regard.

Certainly, as Mr. Bean stated, there is nothing implicitly incorrect in seeking to enhance the propagation of species which are for some reason or other suffering. However, the exception under the ESA which has allowed that has been subject to some abuse and I understand that there have been cases where dead species have been imported into the United States under this exception. Certainly it's hard to see how they can increase the species in the wild.

Secondly, I guess the problem would be that we would not want this to turn into a reason for a depleted species to be sought out and taken for display. This is because, probably, the best chance for a species to be enhanced is in the wild, if we can deal with the problems there, since we know so little about the animals and how they react to captivity. If the concern is that there are animals which are stranded and for some reason have to be taken in, for instance, some marine mammal who loses its mother at a crucial point in its process of growing up, there should be a way to deal with that sort of a broad change in the Act allowing the taking of depleted species for display.

Mr. CLEMENT. The 1984 amendments included a provision that bans the importation of tuna from nations that do not have a tuna/dolphin regulatory program comparable to ours and whose tuna fleets do not have a rate of dolphin mortality comparable to that of the U.S. fleet. How did the NOAA arrive at the definition of comparable and would not ban on the importation of foreign tuna, as provided in the Act, be an effective tool for bringing down foreign kills of dolphin, since it appears that they are responsible for the majority of such kills, in recent years?

Mr. BEAN. Well, sir, they arrived at the definition of comparable through a rule making process that was completed about four or six weeks ago, I believe. The problem with the rule that resulted from that rule making has less to do with the definition of comparable, however, than with the time when the requirement of comparability will be met.

Under those regulations the requirement that foreign fleets achieve comparable rates is postponed until 1991, whereas the 1984

amendments were presumably to take effect immediately. In fact, they are not yet in effect and will not be for another three years. That, I believe, is the critical defect in the regulations.

Mr. BRICKLEMYER. If I might, I was looking through those regulations.

They're very interesting regulations because they are interim final regulations that go into effect within I think 30 or 45 days of publication. But the comment period is open beyond that. So we would have an interim final regulation that would still be available for the public to comment upon and I guess when that was finished they would change them or not, depending upon the review of the comments.

Nonetheless, in the reporting that the regulations propose to establish for the foreign fleets, they could take common dolphins and count the take rate of those, and then lump together all other marine mammals that are taken. However in the requirements for the U.S. fleet we have specific reporting for specific species. It seems to me that you would have substantial problems if you had a species (other than common dolphins) which was in trouble in one of these foreign fisheries because there is no species specific reporting there would be no way to tell that was going on and it would not be accorded the care and attention that it would get under current regulations applicable to the U.S. tuna fishery.

Mr. STUDDS. Thank you gentlemen.

Obviously as we get a chance to digest the details of this, we will be in consultation with all of you. And I hope very much that it can be worked out. If you can resolve this, we may have other problems to put you to work on in other fields.

We thank you. We thank you for your efforts. We look forward to working with you in the weeks ahead.

Mr. STUDDS. Now comes the Government, panel two.

We're going to hear from Dr. Evans of NOAA and Dr. William Fox of the Marine Mammal Commission, each of whom have also taken the five minute oath, I understand.

Your prepared statements will be inserted immediately following your oral presentations.

Dr. Evans, welcome back.

STATEMENT OF DR. WILLIAM E. EVANS, UNDER SECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. EVANS. Thank you very much, Mr. Chairman, members of the committee.

The Department of Commerce supports reauthorization of the Marine Mammal Protection Act because it is an important part of our Nation's wildlife conservation efforts. It may be one of the most important. I have submitted my full testimony for the record and will briefly summarize the more important points.

Although we have made significant progress in managing marine mammals, a number of challenges remain and many of those were mentioned by the group that appeared before us. There are increasing numbers of interactions between marine mammals and human activity. Our challenge is to find a balance between man's need to

use the marine environment and the maintenance of healthy stocks of marine mammals.

I think Dr. Alverson summarized it very well when he was talking about how we've been successful in many ways in the Magnuson Fishery Conservation and Management Act as well as in the Marine Mammal Protection Act. And we have increased the number of fishermen, and in some areas we've increased the number of marine mammals, therefore increasing the problem of interaction between these two groups.

Our immediate concern is a lack of authority to allow takes of depleted marine mammals incidental to commercial fishing operations. Unless this issue is resolved, the fishing industry could be faced with severe economic losses. And I think Mr. Gutting addressed some of those.

In a recent case involving a permit to take Dall's porpoise, the Court of Appeals ruled that if there is a possibility that a depleted species, or species of unknown status, could be taken during the fishing activity, than no incidental take permit for any species can be granted even if the incidental take has a negligible impact on those other species. Under current law, NOAA will not be able to issue permits to most domestic fisheries that interact with marine mammals, and only limited small take authorization can be made.

Fortunately, the seriousness of this problem is recognized by members of both the commercial fishing industry and the conservation community, as we just heard. They have formed a working group and have proposed a solution that is acceptable to a wide range of interests, and also in general to NOAA. I support their efforts and believe that their proposal will be useful in increasing our knowledge of the magnitude and impact of the incidental take problem, and the steps necessary to mitigate these impacts. Unfortunately, I've not had an opportunity to read their proposal in detail, but what I have seen is very impressive. And I think that they should be congratulated for their efforts.

Another human/marine mammal interaction problem has increased over the last several years, commonly called the Hershel or the Nuisance Animal problem. These are seals and sea lions generally that are damaging other marine resources such as salmon and steelhead trout in the Northwest. And they are causing significant losses of fishing gear and catch. We're working with the industry and the conservation community to address this problem, which is a very serious one.

Effective administration of the Marine Mammal Protection Act hinges upon NOAA's ability to fully enforce its provisions, and believe that the Marine Mammal Protection Act enforcement provisions could be improved. We are proposing technical amendments to strengthen the Marine Mammal Protection Act's enforcement provisions and make them more consistent with other natural resource protection laws.

In reference to the sale of fur skins, which was alluded to by Congressman Young from Alaska, Aleut residents of the Pribilof Islands want to sell fur seal skins taken in the subsistence harvest. This is currently prohibited unless the skins are first made into articles of native handicraft. This last year the quota for subsistence was 1,802 seals. And changes to the native subsistence provisions

would be acceptable to NOAA if the take remained truly for subsistence purposes and abided by the laws under the Subsistence Act and if they could be adequately enforced.

Lastly, I wish to inform the subcommittee that NOAA has published the interim final regulations governing the importation of tuna from those nations fishing on porpoise in the Eastern Tropical Pacific, which was mentioned by the other panel. In reference to 1991, I would like to remind the panel that comparable in this case is comparable kill, which is currently .16 dolphin or porpoise per ton. We do have the right to embargo tuna at the present time if the boats do not have the proper nets or the proper gear on board. And by 1989 we will be able to embargo any boat that does not have comparable gear or showing some intent that they are abiding by the law as far as the gear regulations go.

We have already embargoed Mexico once, one boat from Mexico, because they did not file the appropriate reports. We believe these regulations will contribute significantly to reduce porpoise mortality in foreign tuna fisheries.

In conclusion, Mr. Chairman, Congress faces a difficult task in reauthorizing and possibly amending the Act. The issues are complicated, but I believe that through cooperative efforts solutions can be developed.

There was a discussion in terms of the costs that were involved, and in addition, although it's not in my testimony at the present time, in 1988, our budget for the three portions of the Marine Mammal Protection Act—the protected species, the research aspect, and enforcement—is \$8.5 million. And the 1989 request is \$3 million less than that, \$5.5 million. And our numbers in terms of what the cost of putting the number of observers on boats suggested in the joint proposal by the industry and the conservation group agree with those numbers that Dr. Alverson mentioned, somewhere in the vicinity of around \$1.5 to \$2 million.

Thank you very much, sir.

[The prepared statement of Mr. Evans can be found at end of hearing.]

Mr. STUDDS. Thank you, sir.

Dr. Fox.

STATEMENT OF WILLIAM W. FOX, JR., COMMISSIONER, MARINE MAMMAL COMMISSION

Mr. Fox. Mr. Chairman, members of the committee, my name is Bill Fox. With me here are John R. Twiss, Jr., Executive Director; Robert J. Hofman, Ph.D., Scientific Program Director; and Michael L. Gosliner, General Counsel. They're back here behind me.

The Commission believes that there are two major reauthorization issues: the tuna-porpoise and depleted species. However, I understand that the committee is interested primarily in the question of depleted species today. And since the tuna-porpoise issue was thoroughly addressed last month in the Senate, we'll skip through my testimony, to save time, right to the depleted issue.

A very critical issue is the impact that the incidental taking of some fisheries, other than tuna, is having on marine mammals, particularly species in population stocks that are depleted or sub-

stantially affected by the fisheries or other human activities, and the impacts that the Act's present prohibition on taking of depleted species may have on certain domestic and foreign fisheries.

I shall be pleased to answer any questions which you may have about the depleted issue. We have not proposed any specific amending language, pending a chance to see the agreement which we understand has been worked on among various elements of the fishing industry and the environmental community over the past several weeks.

We heard today that there is apparently an agreement, which I have not seen. They've worked very hard, and are to be commended on this.

I do hope that the concept of conservation plans will figure prominently in whatever the group produces. Some background may be useful in this regard. The Endangered Species Act requires that recovery plans be prepared for endangered and threatened species unless for some reason a plan would not promote the conservation of the species. Application of the idea of recovery plans to marine mammals has been something we have pursued with a number of species.

With respect to the West Indian manatee, we insisted in the late 1970's that a recovery plan and a comprehensive work plan, the implementing mechanism for the recovery plan, be written. The plans have been invaluable in directing and coordinating Federal, State and private efforts to address manatee related problems. The plans have proved so valuable that the Department of the Interior is now enthusiastically updating the manatee recovery and comprehensive work plans. Had it not been for the original recovery plan, progress realized to date would have been much less.

With respect to the Hawaiian monk seal, an endangered species which occurs entirely within the United States waters, a similar situation existed. At the insistence of the Commission, a recovery team was appointed and a recovery plan written. Had it not been for that recovery plan, and the Appropriations Committees' vigorous commitment to support of the program, the situation with monk seals would unquestionably be far worse. As it is, they may be holding their own.

For a number of years, the Commission has recommended the drafting and implementation of recovery plans for right and humpback whales. After Dr. Evans assumed leadership of the National Marine Fisheries Services, recovery teams were appointed and work has started. I am pleased to say that the Commission was able to provide the basic documentation on which these plans are being developed.

I mention these species as examples of how carefully developed plans which comprehensively address research and management issues can be of great value in efforts to restore species. Moreover, I think that in the long run they save money by ensuring that critical issues are defined clearly and research and management efforts are focused on these issues.

Consequently, I think that development and implementation of conservation plans, for species that are threatened, endangered, depleted, or substantially affected by human activities, should be an

important part of any agreement governing the taking of depleted species.

Such plans should clearly describe the existing situation and all the various conservation issues affecting the species, population, and its habitat; and present an organized plan for research and management actions based on the analyses done.

It was with precisely this idea in mind that we did the species reports with research and management recommendations for the ten species of Alaskan marine mammals that you have before you. These reports should serve well as base documents for developing cooperative plans and agreements.

Specifically, I think that conservation plans should include: an assessment of the status of the affected species or population stock and the habitat essential to its recovery and/or maintenance; 2) a description of the nature, magnitude and causes of any known population declines or loss of essential habitat; 3) an assessment of the nature, extent, and significance of existing and potential threats to the species or population stock and the habitat essential to its recovery and/or maintenance; 4) an assessment of the impacts, if any, of the species or population stock, including assessment of the effects of any restrictions on the taking of the species or population stock, on fisheries, offshore oil and gas development, or other human activities; 5) a discussion of any critical gaps in knowledge of the vital parameters of the species or population stock, its habitat requirements and essential habitats, the threats to the species or population stock, and the effects of the species or population stock on fisheries, offshore oil and gas development, or other human activities; 6) a description of the research, management, and other measures needed to fill critical data gaps, restore or maintain the species or population stock within its optimum sustainable population range, protect essential habitats, and avoid or reduce impacts on fisheries or other human activities; 7) an assessment of the likely impacts of the proposed research and management plan on the affected species or population stock and on fisheries, offshore oil and gas development, and other human activities that could be affected by the proposed action; and 8) a description of the reporting, monitoring, and other programs that would be required to verify the predicted effects and to detect the possible unforeseen effects of any authorized taking.

With respect to the issue of reauthorization, the Commission recommends reauthorization of Title II of the Marine Mammal Protection Act at a level of \$933,000 for Fiscal Year 1989 and such sums as may be necessary for Fiscal Year 1990.

I hope this review has been helpful. Thank you for having invited us to testify.

[The prepared statement of Mr. Fox can be found at end of hearing.]

Mr. STUDDS. Thank you, gentlemen.

Dr. Evans, I didn't catch exactly what you said with respect—I think you were attempting to defend yourself against the charge of lightening speed in implementing the 1984 amendments, in suggesting that the period of time between 1984 and 1991 really wasn't seven years, as it appears to the untutored eye.

Do you want to go back again and try that one more time?

Mr. EVANS. That was not what I was trying to do, Mr. Chairman. What I was trying to do was to clarify the point that was not mentioned as to what comparable meant. And comparable means comparable kill per catch.

I don't really feel that there's any excuse for the delay between 1984 and going up to 1991, that I would be willing to put before this committee. One of the things that I was concerned about—

Mr. STUDDS. Is there anything you've been ordered to put before this Committee? Has anyone—

Mr. EVANS. No, sir. No I haven't been ordered to put anything before this committee.

The reason I'm before this committee, Mr. Chairman, is because I've been very interested in this Act since 1969 and 1970, and was one of the scientists who was interested in getting its implementation. And so I have followed it very closely since that time, and I'm very interested in getting it reauthorized in a proper fashion.

Mr. STUDDS. I don't question that. But you can understand that there are some questions about the haste of implementation of the statute. Are there any answers? I mean the questions are obvious.

Mr. EVANS. In terms of we can—we will start embargoing catches in 1989 for those vessels that do not abide by gear regulations and the other things set down in the Act.

I have with me, right here now, Charles Fullerton who was involved—who is the Acting Assistant Administrator of Fisheries right now, who has all of the details of the current regulation, which he could go into more detail, but we will start embargoing in 1989 any vessel that does not come up with the appropriate gear. In other words, having the right mesh size for the backdown area; having the appropriate kinds of boats on board; being able to assist animals over the net in the backdown area; and have all of the same procedures which are required of American fishermen.

Mr. STUDDS. But what is it that will not come into effect until 1991?

Mr. EVANS. Right now the United States—we have a limit right now, or a goal for our fishermen to come up with .16 dolphin kill rate per ton. And that has to be comparable.

Charlie, do you want to—

Mr. FULLERTON. I think in 1989 it's not just the fact that they must have appropriate regulations adopted. Every country must have an observer program in effect, must have the nets modified to meet the same requirements we have for our nets.

But also they must show a declining kill from this year on a downward trend toward meeting the comparable rate in 1991. In other words, if they don't show some improvement this year, we will embargo them in 1989. They've got to show a downward trend from their present level of kill per ton toward the goal that we've set as comparable to our fleet.

Mr. STUDDS. So it really only took us five years to get started, not seven?

Mr. FULLERTON. So it really took us—let me explain a little about that, if I can, Mr. Chairman.

We started in 1984 to require the nations to adopt regulations, but not to meet the requirements of comparability as far as kill per ton. And that's the reason we embargoed Mexico in 1984.

Mr. STUDDS. What do you mean you embargoed Mexico? What does that mean?

Mr. FULLERTON. We prevented them from shipping yellowfin tuna taken out of the Eastern Tropical Pacific into the United States.

Mr. STUDDS. Uh-huh.

Mr. FULLERTON. That was lifted when they adopted a comparable set of regulations.

Mr. STUDDS. Did the Japanese have such a comparable set?

Mr. FULLERTON. We don't have any Japanese fishing in the Eastern Tropical Pacific.

Mr. STUDDS. Well, what about where we do have it?

Mr. FULLERTON. They don't fish on porpoise.

Mr. STUDDS. Okay.

Mr. FULLERTON. It's only those vessels fishing in Eastern Tropical Pacific that fish on the porpoise.

Mr. STUDDS. All right.

Mr. FULLERTON. So Mexico now decided to come into the program. They are the biggest fleet in the whole Eastern Tropical Pacific. They're much larger than ours. They have now adopted the full observer program, in fact, are running 43 percent observers. They have full regulations as ours, and I would say that they're going to be comparable before 1991 at the rate that they're going.

We have the other nation—the next largest nation is Venezuela, with 24 boats. That nation in 1984 required every vessel landing there to abide by regulations that would protect porpoise. They were one of the first nations to do that.

The only country that fishes the Eastern Tropical Pacific that doesn't have a set of regulations, and would not be able to ship tuna in the United States taken from the Eastern Tropical Pacific is Vanuatu. Vanuatu has four boats operating and they are now in the process of adopting regulations.

But it's not the 1991, the comparability started two years ago when we started keeping track of them. But if they don't show an improvement this next year, they will be embargoed. So we haven't been sitting entirely on our hands, sir.

Mr. STUDDS. No, it's been a very exciting five years. I can—

[Laughter.]

Mr. FULLERTON. It has, Mr. Chairman, when you realize in trying to get those foreign nations to adopt those kinds of regulations and change their whole attitude about the take of porpoise. They thought much differently than we did. And they have come a long ways.

Mr. STUDDS. If I were Vanuatu, I would be the one that would be worried, not Mexico. I think they're much more likely to be the subject of an invasion than—

Mr. FULLERTON. I won't comment on that.

Mr. STUDDS. What did you mean—did you misspeak, Dr. Evans, when you said we embargoed a boat? You didn't mean that, did you?

Mr. FULLERTON. No, he meant a country.

Mr. STUDDS. He meant a country, yes.

Mr. EVANS. Yes.

Mr. STUDDS. In the case of Vanuatu it may not be that much of a distinction, but in some other countries——

[Laughter.]

Mr. FULLERTON. No, that's correct.

But I wouldn't be a bit surprised to see most Vanuatu boats shift flag back to United States now for other reasons, not just for this.

But the thing we've come along rather easily on bringing this into effect was prevent them from just saying to hell with you, we're going to go ahead and do what we want on porpoise and sell our fish in the European market. Although there are attempts now by the conservation groups to get regulations in the EEC, that has not been accomplished, and the big market for Mexico and Venezuela has been the foreign market there. The prices were higher. Our prices are starting to rise now. I think these countries are very interested in not shutting the door of shipping into the United States. So that's why they're going along.

But if we had gone out and just put a flat reg out, I think we would have lost those nations, and we would not have been saving porpoise.

Mr. STUDDS. Thank you, sir.

Dr. Fox, has the Commission had its breath taken away by the speed with which NOAA has proceeded to implement the Act?

Mr. Fox. Well, the Commission has been disappointed in the speed. The Commission has sent letters, starting with July, 1984, advising the National Marine Fisheries Service on what it felt was appropriate, commenting on earlier drafts that it had done, and the Commission had hoped that everything would have been implemented far earlier than it has.

In fact, it has commented such several times.

Mr. STUDDS. Dr. Evans?

Mr. EVANS. Mr. Chairman, I would like to point out a clarification of my one point of my disappointment. I have to admit that I signed some of those letters that were sent in 1984 when I was Chairman of the Marine Mammal Commission, sir.

Mr. STUDDS. Which is it you're being disappointed about, the sending or the receiving?

[Laughter.]

Mr. EVANS. Disappointed in the speed, sir, that you were talking about.

Mr. STUDDS. I see.

Well, maybe I better not ask about the recovery plan for the right whale, then.

Mr. EVANS. Prior to 1986, sir, we didn't have a recovery plan for the right whale. We do now have one.

Mr. STUDDS. When did the Marine Mammal Commission first suggest that it might be a good idea to have one?

Mr. EVANS. I can go back to some of the corporate memory, but I believe when it had been recommended at least four or five years prior to the time I took over the Chairmanship of the Commission, and then it was recommended all the time I was the Chairman of the Commission, sir.

Mr. STUDDS. What are we supposed to think happened in the four or five years prior to your coming into that position? Was it being given every possible consideration by NOAA, or what?

Mr. EVANS. I really could not answer that, sir.

Mr. STUDDS. I see.

Well, I guess it's just a very—the fact that you're here must at least mean that your budget request has been denied for this year, or you couldn't afford to get here. So we should be grateful for that much, I suppose.

The gentlelady from Rhode Island?

Ms. SCHNEIDER. Thank you, Mr. Chairman.

Dr. Evans, I wonder if you could please tell me, does the Act allow you to issue small take exemptions in cases where there are no estimates on the status of the marine mammal population?

Mr. EVANS. Not at the present time, with the current litigation, I believe.

Ms. SCHNEIDER. You're not permitted to?

Mr. EVANS. No.

Ms. SCHNEIDER. How about in the past? Small take exemptions have been issued to fishermen on the East Coast because the take of marine mammals has been negligible. Is it your intention to continue issuing the small take permits on the East Coast where the incidence is small or none whatsoever?

Mr. EVANS. I would like to refer that to legal counsel, Congresswoman Schneider. The main reason is because we, as you know, we are still currently in litigation on the Dall's porpoise issue, which is what you're referring to, and that's in terms of both small take and permits.

This is Eileen Cooney, who is general counsel for National Marine Fisheries Service.

Ms. SCHNEIDER. Thank you.

Ms. COONEY. Now, the question was whether we could issue a small take exemption for a marine mammal that is not depleted, but for which we don't know the status?

Ms. SCHNEIDER. Yes.

Ms. COONEY. Yes. Our office believes that we can issue a small take exemption in that position, in that situation. Although we realize it's not an absolutely clear situation, we do believe that is the better interpretation.

Ms. SCHNEIDER. And so, on the East Coast where there is relatively small take, and where the depletions are to some degree unknown, is it your intention to continue to be issuing those on the East Coast?

Ms. COONEY. I don't know—I mean that depends on the facts of whether—I mean whether they are negligible takes and whether there would be—

Ms. SCHNEIDER. Well, the facts are so far that the takes are negligible, and that the depletion is limited.

Mr. EVANS. Let me try to get one clarification, at least try to make a point anyway. That is that on the East Coast, frankly, we do not have very good information on most of the species except for the bottlenosed dolphin.

Ms. SCHNEIDER. Right.

Mr. EVANS. We do have some estimates of what the population is of that species. But in terms of things like common dolphin and the white sided dolphins, and white beaked dolphin, which also occur on this coast, we do not have good population numbers on them. So

it's difficult to determine what constitutes a small take, because that is directly tied to the size of the population.

Ms. SCHNEIDER. Okay.

Mr. EVANS. One thing I can say, is that so far the U.S. fishermen on the East Coast with trawl nets have not taken any dolphins, as far as we know, or very few. Most of the take is taken by foreign fishermen who use extremely large trawls with very large mouths, and trawl at extremely fast speeds. And therefore, they overtake the school which they use very elaborate sonar to detect the school, the dolphins are feeding on the school and they sometimes pair-trawl, where they have two ships that are pulling the nets. They get onto the school extremely fast, and catch dolphins.

In the case of the foreign fisheries, we do have observers, and this goes back to the statements that were made by the prior panel in terms of the need for having observers on board vessels. We have reasonable data on the amount of take by foreign fleet, because we do have observers on foreign vessels. That take has doubled this year over last year. So that a lot of that has to do with differences in fishing technique and increases in the size of the nets.

Ms. SCHNEIDER. Okay. Thank you.

Last year the dolphin take by the U.S. tuna fleet was about 14,000, and I understand that this is considerably less than the quota of 20,500 which was set back in 1981. Is that low number of dolphin taken last year indicative of a trend that might enable you to lower that quota?

Mr. EVANS. Well, I'll let Mr. Fullerton respond to that. However, I will make one statement.

There are lot of things that go into determining the size of the quota in that fishery. One of those has to be with the fact that quite frequently the fishermen will fish on school fish. Sometimes they will not fish on schools that have dolphins with them, so that that gets factored in, in terms of the total number of sets that are made, and sometimes there's a tendency to decrease it. If they can catch fish without setting on dolphins, they will frequently do that. So that it's hard to determine whether or not the 14,000 number was actually because they got better and they were doing a better job, or it was because the fish happened to be running in such a fashion that they could catch them without setting on dolphin.

Ms. SCHNEIDER. Okay.

Mr. Chairman, I have no further questions. I'm sorry that I have to dash in and dash out, but I have another important conference going on.

Thank you.

Mr. STUDDS. Mr. Carper?

Mr. CARPER. Let me defer, if I can, to Mr. Anderson, who's been waiting longer than I have.

Mr. STUDDS. The gentleman from California.

Mr. ANDERSON. Thank you, Mr. Chairman.

My first question is for Mr. Evans, and I think it's fairly straightforward.

Mr. Evans, is your inability to assess the optimum sustainable population for a number of marine mammals a result of insuffi-

cient resources, scientific difficulty, an unrealistic time period to assess an OSP, or for some other factor?

Mr. EVANS. It's a combination of all those, except for possibly resources, and certainly resources do come into it as the number of species increases, one has to look at.

It's a question of what constitutes optimum. The sustainable part certainly is fairly easy to come up with. But an optimum population is related to the population at pre-exploitation, and that's difficult to determine for a number of species.

In the case of most of the pinnipeds, the seals, and the fur seals, and the walruses, it's a little easier to come up with numbers because at certain times of the year all of the animals are on the beach, where we can walk along and try to—if we do good surveys, and we can count them. In the case of a number of other species that are at sea all the time, it's very difficult to determine the total number of animals in a population.

As an example of that I think a number of years ago, about five I think, I received a certificate from the National Marine Fisheries Service thanking me very much for participating in 1974 in the determination of the absolute abundance of dolphins in the Eastern Tropical Pacific. I thought that was rather humorous, because it's absolutely impossible flying from an airplane to do anything more than come up with a rough estimate of the number of animals, based on all sorts of models.

We have no way of determining, in the case of many of these animals, many of the species, what the optimum is. So regardless of what the resources would be, I think we've done, with the resources that were available, as good a job in the Eastern Tropical Pacific as we possibly can. It's a very difficult thing to do. So in some ways it's an ambiguous term. And that makes it difficult for some people who want absolute scientific answers to some of the questions. So it makes it difficult some times to determine, in the case of some species, especially in some areas where we don't even know today what all of the species are that occur, especially in the ocean area.

Some of the areas off the East Coast, for instance, almost every year as we get more information, we find that there are larger numbers of certain species, like for instance pygmy sperm whales that we only thought existed in the past. And the numbers in populations of animals, as the effort increases the size of the population sometimes, has a tendency to increase, not because it's growing, it's because our ability to be able to survey that population has improved, the science has improved, our models have improved.

So that's a very difficult issue, and I think that I still have some questions as to exactly how to go about determining optimum sustainable population. But with no better measure than that, I think that's the one that we have to go with because it is a conservation oriented measure, it says optimum sustainable population, and so it has a tendency to be very strong on the conservation side. In the case of marine mammal populations, I think that's necessary.

Mr. ANDERSON. But you've been involved in this, for what, eight, ten, twelve years?

Mr. EVANS. Twenty-five years, sir.

Mr. ANDERSON. Twenty-five years, and if to you it's difficult, how are we going to expect to get a better system? Or can we, or do we have to do—

Mr. EVANS. I don't—I think we're dealing of the nature of the particular species that we're working with. With the coastal species, I think that we are doing a reasonably good job. With the species that occur very far at sea, we have a difficult time mainly because they're spread out, there's a lot of area. There's over two and a half million square miles, or three million square miles in the Eastern Tropical Pacific alone. Being able to come up with a reasonable sample of that area is something very difficult, let alone doing it within the whole 200-mile EEZ.

In other cases animals that live close to shore, like killer whales and pilot whales in some areas, and California gray whales are relatively easy to count because they move close in shore and they come into areas where we can see them, and they have regular patterns of movement that we can—

Mr. ANDERSON. We take pictures of them as they go by, so there's no problem there.

Mr. EVANS, as you well know, the Marine Mammal Protection Act authorizes the Secretary of Commerce and the Secretary of Interior to transfer marine mammal management authority to the States pursuant to an approved State program. However, as you also know no State program has been approved. Why is this so? Are the States uninterested in participating in the management of marine mammals?

Mr. EVANS. No, I don't think it's because the States are uninterested. I think some of the States don't have the resources. I think the best case, and I actually would like to turn part of this over to Dr. Fox, who is with the Marine Mammal Commission, who has really made great strides in working with the State, especially Alaska, in coming up with an attempt to try to return the management, at least of some of the marine mammals to the State of Alaska. California has shown some interest, but there have been some problems mainly because of the fact that they do have to determine the status of the stocks every year. That is a burden on the State financially, and I think that's part of the problem, but I think that Dr. Fox could probably expand on that.

Bill?

Mr. ANDERSON. Mr. Fox.

Mr. Fox. Well, I think Dr. Evans is essentially correct in that the States have all intimated that it's a very serious problem for them to get the resources from their State legislature to meet the burden required in the Marine Mammal Protection Act, when they don't have authority over those marine mammals.

It's not a very short program. It's a fairly long and concerted effort to get that information. The Commission has been working with Alaska and the various elements to look at ways where the State could participate in management. And what the Commission has adopted or supports is the idea of going into cooperative agreements to work on the management and research of marine mammals.

Mr. ANDERSON. My final question, Mr. Evans and Mr. Fox. Isn't it true that you can have a somewhat bizarre situation where

NOAA would not be able to issue a general taking permit because the optimum sustainable population is unknown, despite the fact that the population in question is growing at an astronomical rate? And do you have any examples where this has occurred or is currently occurring?

Mr. EVANS. Well, at the present time I don't know of any that have occurred.

Mr. ANDERSON. You mentioned some of the schools a moment ago out in the Pacific that were growing pretty fast.

Mr. EVANS. Well, in terms of the California sea lion, in terms of that population growing at a rapid rate, is that what you're referring to, Congressman?

Mr. ANDERSON. Yes.

Mr. EVANS. I don't believe that stock is considered to be depleted. The Northern sea lion, on the other hand, is something that's really quite different. That's a different species that occurs in Alaska. At one time that population did occur all the way down to the islands off of Southern California. Now it's limited to the areas up around from Seattle northward, and the numbers in most areas have gone down rather radically over the past several years.

So, when we say sea lions, there are sea lions and sea lions. There are California sea lions who are doing extremely well, and in fact, the population is expanding northward to the State of Washington, and possibly beyond that. In the case of the Steller sea lion, which is the one that we were referring to as listing as depleted, that population is indeed decreasing rather rapidly.

Mr. ANDERSON. Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from Delaware.

Mr. CARPER. Thank you, Mr. Chairman.

Mr. EVANS, you talked about two different kinds of strandings. One was a whale and the other was the dolphin stranding. And you alluded to the other fact that a number of dolphins washed ashore first last year in the area along New Jersey, Delaware, Maryland coast, and then later on down along Georgia and the Carolinas.

We learned almost a year ago that what had apparently happened was that the immune system of the dolphins had broken down and the bacteria which were commonly found in the dolphins had actually killed them. What more do we know now than we knew then?

Mr. EVANS. Well, we have a report which has been submitted to us by the Marine Mammal Commission by Dr. Geraci, which goes into some of the findings on viruses and a number of other things in the document. And I would like to—I think we should, if you do not have a copy of this, we certainly will make it available to the committee.

I have not read the report in detail, however, I did hear Dr. Geraci's report in Miami at the Marine Mammal Commission meeting there. And a rather extensive study was done and there have been a number of bacteriologies and virologies that have been identified, two or three different kinds of viruses. And in a couple of cases some of those that we're not very familiar with, that work is still ongoing. A lot of those specimens are out and being processed. That is a very slow process because you have to take the tissues, and grow the viruses in order to be able to identify them, and a whole

series of things that are done, so it's a slow procedure. But the interim report is available and I think it expands rather significantly in the amount of information that we did know prior to—say about a month ago.

Mr. CARPER. Is there somebody here who's with you who's in a position to expand on that?

Mr. EVANS. Dr. Fox, do you—

Mr. Fox. I can't respond in more detail than that. I do have a copy of the report. It's nine pages. We have looked at Dr. Geraci is on the Committee as Scientific Advisor. He lead this effort since July of 1987, roughly 600 dolphins have washed up along the East Coast. We don't believe that this problem has spread to the Gulf Coast, although there were a couple of animals that washed up in the Mississippi Sound area by February. They've been looking at bacteriology, virology, things like there was concern that there was infection by retro viruses, including the human immuno suppressant virus, but all of these tests have been negative to date.

Mr. EVANS. There's been nothing, I believe, Congressman, that has as far as we know that has is transmittable to humans.

Mr. Fox. That's correct.

And we looked at toxicology—they've looked at toxicology and there's a major effort ongoing now that's supported by the office of Naval Research, the National Marine Fisheries Service, Marine Mammal Commission, pretty much all over the Country in looking at the various possible causes for this dolphin die off. And it's a very long and extensive process to look at these tissues and try to isolate what the problem is.

The program is ongoing and I think we'll find an answer to it.

Mr. CARPER. Again, let me restate my question. Have we learned by virtue of this report, or the work that's been done, what was causing the immune systems of the dolphins to break down and to make them susceptible to the bacteria—

Mr. EVANS. No, sir, I don't think we know precisely what the cause of that is. One of the things that there are all kinds of theories that have come up. We did have an exceptionally warm year. There were large warm water eddies that were stalled for all practical purposes off of the East Coast. These allowed for a lot of bacterial growth. We have some indication that there have been some increased toxin in certain fish, especially concentrated in the livers.

We don't know whether or not eating fish that have become toxic because red tide organisms or other toxic organisms that they have ingested have caused say a reduction in the general overall resistance of some of the dolphins involved, therefore allowing other regular bacteria to take over. This is something that does happen in other animals including humans, where your resistance is lowered by one thing, possibly eating food that's not appropriate, and therefore you become much more susceptible to fairly common occurring bacteria. So this is one possibility that could have happened, but we do not know precisely what has happened.

Mr. CARPER. At what point will we know whether or not we're likely to see a recurrence of this cycle in 1988?

Mr. EVANS. One of the things we're looking at right now is that if it is indeed tied to the differences in the temperature, the pres-

ence of various toxic organisms, dinoflagellates, in particular, or red tide, and temperature off of the coast. The temperature this year is predicted to be quite different, and the nature of the Gulf stream apparently is going to be quite different, and if—although it's going to be very indirect, if we do not have the same sort of kill off that we had last year, the rather unusual one we had last year, then maybe there were some environmental factors involved in it.

Mr. CARPER. I believe it was the Washington Post that recently reported that the Marine Mammal Commission noted the evidence of possible poisonous levels of chlorinated hydrocarbons in some of the animals last year. Where might those have come from, and is that something that's been verified? And Dr. Fox, if that's a better question for you, please go ahead.

Mr. Fox. We've been looking at all those things. I don't recall those specific compounds being mentioned in Dr. Geraci's report. I know they've been looking at biotoxins, which are not those compounds that you mentioned. So I'm not aware of that.

Mr. CARPER. The article is dated Sunday, May 1st in the Washington Post, and it alludes to the Marine Mammal Commission reported evidence of possibly poisonous levels of chlorinated hydrocarbons in some of the animals.

Mr. HOFMAN. If I can respond—

Mr. CARPER. And what is your name, sir?

Mr. HOFMAN. My name is Bob Hofman. I'm the scientific program director for the Commission.

Mr. CARPER. Good. Thank you.

Mr. HOFMAN. I would anticipate that the source of that information goes to materials that were presented during a review held in Miami during the Commission's meeting in December.

As Dr. Fox indicated, there are a number of investigations ongoing, looking at things such as the levels of possible environmental contaminants, pollutants, chlorinated hydrocarbons, biotoxins of a variety of types, viruses, and also looking for environmental correlates, as Dr. Evans indicated.

Preliminary results reported at the Commission's meeting in Miami indicated that in some of the animals where the analyses for chlorinated hydrocarbons and other pollutants had been completed, there were in fact levels that were at or above levels that would be considered toxic in terrestrial mammals. Whether or not that represented an acute problem or a chronic problem, or whether it was representative of the animals that were dying as a result of the event that occurred over the course of late last summer through, as Dr. Fox indicated, January and February of this year is uncertain because all of the samples have not yet been analyzed.

So what was reported in December, and I think the source of the information in the Washington Post article, was based on a small sample size. The analyses are continuing and I think the expectation is that—I think we have samples from something on the order of 200 animals. And the initial screening was screening as many as 20,000 compounds through forensic analysis done through the National Veterinary Services Laboratory in Ames Islet, so it is a quite time consuming process.

But my understanding from conversations with Dr. Geraci recently is, we expect the majority of those analyses to be complete within the next four to six weeks.

Mr. CARPER. One last question. Where do the chlorinated hydrocarbons come from? What is likely to be the source of those if they are indeed present in substantial amounts?

Mr. HOFMAN. Well, that would be a subject of great speculation. And my guess is it would be from general sources of pollutants from runoffs in sewage systems, from fertilizers from agriculture use, and those types of things, as opposed to an event where there was illegal dumping or something of that nature. The kinds of pollutants that we're seeing in the tissues would be indicative of perhaps broad ranging exposure.

Dr. Evans may have a comment on that.

Mr. EVANS. We do have a—Congressman, which we could send you, and certainly would—a copy on the status and trends along the East Coast indicating that there are a number of areas both in the Delaware Bay, Chesapeake Bay, New York Bight, and a number of others where there are rivers where there are very, very high levels of the number of hydrocarbons and other heavy metals, and a variety of other toxins. I think that one of the problems is that these are then ingested by fish, which sometimes concentrate, and it doesn't necessarily kill the fish, but it does concentrate them.

I would like to read to you, if you would, the statement in Dr. Geraci's report. It's very short. It says "Preliminary results reveal the presence of a wide range of chlorinated hydrocarbons and heavy metals. The levels of many of the fat soluble compounds are similar to those reported in other studies on cetaceans. Yet comparisons are difficult to make since the available data are reported in an inconsistent manner, and do not always take into account lipid concentration of each tissue." Now that is the only statement that he has in his report in referencing chlorinated hydrocarbons or heavy metal toxins, sir.

Mr. CARPER. Okay.

Thank you all.

Mr. STUDDS. I thank the gentleman.

Dr. Evans, just before we end, I gather you've got a lot of work to do in this field, and that there are some very major questions of considerable importance which are unanswered, or in fact, unanswerable at this point, given our data.

And I was just looking at your own list of what we know about the major species, and there's an awful lot of times the phrase "unknown" appears under estimated optimum sustainable population, under status. In fact, on this first page over half of them are listed as unknown.

Mr. EVANS. That's absolutely correct, yes, sir.

Mr. STUDDS. There's a lot we don't know.

Mr. EVANS. Yes, sir.

Mr. STUDDS. Is it important to acquire that knowledge?

Mr. EVANS. Yes, sir.

Mr. STUDDS. It is.

I understand that you have given—obviously you can't give your blessing to the compromise that was talked about by the panel that

proceeded you, but you have an initially, vague, generally positive impression. Did you hear that it would cost some \$2.5 million or so to the Federal Government?

Mr. EVANS. Yes, sir, I did hear that. And——

Mr. STUDDS. Does that effect your impression of it?

Mr. EVANS. My impression is that in order to have that kind of a program, which if we are going to get the kinds of information we need to provide the data that we have to by the statute, that an observer program of one sort or another is required, and as you've said, sir, the question of who pays for it is something else. But the fact that we have such a program I think is absolutely necessary.

Mr. STUDDS. Well, then it would be sort of mean of me to ask you the obvious question as to why you asked for a million dollars less this year than last?

Mr. EVANS. Because we didn't anticipate what the nature of the problem was going to be, and that there was going to be a recommendation for an observer program. And I think that we need to——

Mr. STUDDS. Never mind the observer program, you can't even do what you did last year. And last year you had a million dollars less than the year before that.

Mr. EVANS. Well, that was the Administration stand. But one of the things I would like to say today, is that we will work very closely with the Congress to do whatever we can. We feel that reauthorization of this Act is important, and a strong monitoring program is necessary, and that it should be reauthorized and well funded. And we'll work very closely with the Congress to achieve that.

Mr. STUDDS. I make a personal plea. I notice that one of the species about which we know apparently nothing, or very little, is the Atlantic white sided dolphin.

I've developed a very good relationship with that dolphin——

[Laughter.]

Mr. STUDDS [continuing]. And I don't know—the ones that I've spoken to in recent years seem to me to feel they're pretty optimal. They seem to be in very good spirits. I don't know that they know you're about to start counting them. You probably aren't, so it's probably—you're not going to get around to them, but if you wouldn't mind being uncharacteristically kind to them if you get around to doing a census of them, or inquiring of them what they think their optimal population might be, or how ever it is you go about ascertaining this information. They're really wonderful creatures, and we haven't got them yet. And I hope we don't.

Those are your marching orders. That, and \$2.5 million more, if you don't mind. We will be working with you, obviously, and Dr. Fox, hopefully as well with the Commission, as we try to see if we can't put some real flesh on this agreement and resolve at least some of these problems for awhile.

Thank you all.

Mr. EVANS. Thank you for the opportunity, sir.

Mr. STUDDS. The Subcommittee is adjourned.

[Whereupon, at 3:25 p.m., the subcommittee was adjourned.]

[The following was submitted for the record:]

100TH CONGRESS
2D SESSION

H. R. 4189

To authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993.

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 1988

Mr. STUDDS (for himself, Mr. JONES of North Carolina, Mr. DAVIS of Michigan, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

A BILL

To authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 7 of the Act entitled "An Act to improve the
4 operation of the Marine Mammal Protection Act of 1972, and
5 for other purposes", approved October 9, 1981 (16 U.S.C.
6 1384 and 1407) is amended—

7 (1) in subsection (a) by striking "and 1988." and
8 inserting in lieu thereof "1988, 1989, 1990, 1991,
9 1992, and 1993.";

1 (2) in subsection (b) by striking "and 1988." and
2 inserting in lieu thereof "1988, 1989, 1990, 1991,
3 1992, and 1993."; and

4 (3) in subsection (c) by striking "and 1988." and
5 inserting in lieu thereof "1988, 1989, 1990, 1991,
6 1992, and 1993."

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TESTIMONY OF

AMERICAN CETACEAN SOCIETY
 AMERICAN HUMANE ASSOCIATION
 ANIMAL PROTECTION INSTITUTE OF AMERICA
 CALIFORNIA MARINE MAMMAL CENTER
 CENTER FOR ENVIRONMENTAL EDUCATION
 CETACEAN SOCIETY INTERNATIONAL
 COMMITTEE FOR HUMANE LEGISLATION
 DEFENDERS OF WILDLIFE
 EARTH ISLAND INSTITUTE
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 SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION
 THE WHALE CENTER

FOR THE
 SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
 AND THE ENVIRONMENT
 OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES

ON H.R. 4189
 THE REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

MAY 10, 1988

PREPARED BY
 LESLEY SCHEELE AND DEAN WILKINSON
 GREENPEACE

PRESENTED BY EUGENE C. BRICKLEMYER
 GREENPEACE

R E C Y C L E D P A P E R

Mr. Chairman and Members of the Committee:

This testimony is presented on behalf of Greenpeace U.S.A. and the following groups: American Cetacean Society, American Humane Association, Animal Protection Institute of America, California Marine Mammal Center, Center for Environmental Education, Committee for Humane Legislation, Defenders of Wildlife, Earth Island Institute, the Fund for Animals, The Humane Society of the United States, Marine Mammal Fund, National Alliance for Animal Legislation, National Audubon Society, Northwind Undersea Institute, Oceanic Society, Society for Animal Protective Legislation, The Whale Center.

We appreciate the opportunity to address an issue which is of major concern to the United States - that of dolphin mortalities in the tuna fisheries in the Eastern Tropical Pacific (ETP). It is an issue which has been intimately tied with the history of the Marine Mammal Protection Act. In fact, a major impetus for the original passage of the Act was the public outrage over the huge numbers of dolphins being killed by tuna fisheries. Since the original passage of the Act, the original goal of reducing "...incidental kill or incidental serious injury of marine mammals...to insignificant levels approaching a zero mortality and serious injury rate" [16 U.S.C. 1371 (a)(2)] has often been compromised and seriously eroded. Accompanying this testimony is a paper tracing the development of this issue over the years.

We are submitting testimony because we are concerned that dolphin mortalities continue unabated at levels which were present a decade ago, and the problems which Congress recognized then have not been resolved. Sixteen years after the passage of the Act, roughly 100,000 dolphins are killed annually. We have not kept faith with the American public and have misled them into the belief that the problem has been solved. The groups presenting this testimony believe that current dolphin mortalities are unacceptably high.

We will address the domestic side of the equation and for the most part will use 1981 as a base year. That was the year that the dolphin mortality quota for the U.S. fleet became permanently fixed at 20,500. Since the quota was set, not only has there been no improvement in performance by the U.S. fleet, but by several measurements performance has worsened. In 1986, the U.S. tuna fleet exceeded that quota and had to be prevented from setting on dolphins for a period of 2 1/2 months.

Before arriving at the quota of 20,500, assumptions were made which have not been borne out. Most seriously, the fleet characteristics were such that it was assumed that the mortality level of the foreign fleets was equivalent to that of the domestic fleet and that the dolphins could sustain a level of 41,000 deaths. Further evidence has surfaced that assumptions on the biology of the animals were inaccurate. As environmentalists, we are deeply distressed by evidence that specific dolphin populations are in serious trouble. We would

also like to point out that when the 20,500 quota was put into place, the Congress indicated that such a level was not acceptable. At that time, instructions were placed into the law that work be conducted on gear modifications and alternative methods which do not involve dolphin encirclement. Certainly if the Congress had been satisfied with quota levels, such a provision would not have been written into the law.

During the last reauthorization, environmentalists negotiated for two provisions. Concerned about the number of dolphins being killed by the foreign fleets, a provision was written into the Act requiring that regulations be issued that their kill rates be comparable to those of the U.S. fleet. It took NMFS almost four years to issue the final interim regulations to implement the mandate of the 1984 statute. Comparability, as defined by NMFS, will not be achieved until 1991--seven years after Congress instructed NMFS to take such steps. The regulations are not only late. They are woefully inadequate for effectively reducing the overall kill. NMFS has offered the excuse that stricter and more timely regulations would push nations into alternative markets where any restrictions imposed under U.S. law would not apply.

Second, the environmentalists were concerned about the status of stocks and asked that a study of trends in abundance be conducted. The National Marine Fisheries Service did not initiate the study until late 1986. However, NMFS now reports that the monitoring program cannot even detect a population

change of less than a fifty percent magnitude over a five year period. Quite frankly, from our perspective assurances made during the last reauthorization were never carried out, and the situation has continued to deteriorate. The concerns expressed then have become serious problems.

The absence of will on the part of NMFS to administer the Act in this area has been evident for some time. Rather than viewing the Act as a marine mammal protection measure, NMFS has acted as if its primary purpose is the protection of the industry and as if the MMPA is an inconvenience to be gotten around. They have failed to observe their statutory mandate, ignored their own evidence, and stalled when they were given explicit instructions.

After sixteen years, the time has come to return to the original purpose of the Act. No progress has been made for over a decade. The kill levels are still at about 100,000 per year. We have been unsuccessful in achieving the goal of the Act through fine tuning and regulation. The time has come to mandate a reduction to zero mortality.

HISTORY

The practice of intentionally encircling dolphins to catch tuna has occurred for some 30 years now and has resulted in the deaths of an estimated 6 million dolphins (Table 1). Exposed 10 years later, the ensuing public outrage was a major impetus leading to the passage of the MMPA in 1972. While the Act called for an immediate moratorium on the taking of marine mammals, ironically

a two year exemption was granted to the very industry which helped inspire the Act. The tuna industry had successfully convinced Congress that they had the problem solved. Congressman Pelly noted that a two year grace period would "give the tuna fisheries association an opportunity to develop what they indicate is certainly a solution." However, during the two year grace period alone, another 350,000 dolphins were killed. NMFS issued a permit to the American Tunaboat Association (ATA) which allowed an unlimited take of dolphins. Only as a result of lawsuits initiated by the environmental community in 1976 did NMFS assess dolphin stocks, impose annual quotas, require dolphin saving gear and techniques, and institute a mandatory observer program. As a result, mortality estimates for the U.S. fleet fell from 166,000 in 1975 to 25,000 in 1977. NMFS then imposed annually declining quotas for the next three years as mortality for approximately 100 vessels averaged 18,625 dolphins. Today's mortality estimates are at levels of a decade ago, despite a much smaller fleet. While both industry and the agency have recently been praised for reducing dolphin mortality, the carnage continues at levels of a decade ago.

Today's quota of 20,500 was first set by NMFS in 1981 and later extended indefinitely. Despite severe interagency disagreement over the status of certain dolphin stocks and in full contravention of the immediate goal of the Act to reduce these kills to levels approaching zero, NOAA in 1981 imposed a non-declining quota of 20,500 dolphins for the next 5 years. The establishment of a static quota was based on several assumptions

and conditions which are no longer valid. Primary among these assumptions was that industry could remain within the quota, the total kill level (U.S. and foreign) would not exceed 41,000 and that such levels would not disadvantage the stocks.

1981 QUOTA

The quota of 20,500 was derived by multiplying a projected catch of 93,000 tons of tuna caught in association with dolphin by a kill/ton rate of .24 which was considered both achievable and technologically practical. This figure was then reduced by 8.5% to reflect a loss in fish catch due to the proposed imposition of a prohibition on evening or "sundown" sets. Interestingly, had the quota been properly adjusted to reflect the number of dolphins spared due to a sundown prohibition as opposed to lost fish catch, the quota should have been adjusted to 15,700.*

It was reasonable to assume that the U.S. fleet could operate within this quota of 20,500. The average dolphin mortality for the preceding three years had been 18,625. Further, the

* The prohibition on sundown sets was due to the undisputed higher mortality inflicted during these sets. These sets, which accounted for an average of 8.5% of yellowfin catch on dolphin, resulted in over 30% of the total mortality. Kill rates during these sets were thus 3-4 times higher than day sets. If the quota were to truly reflect the effect a ban on sundown sets would have on dolphin mortality, the quota should have been reduced to reflect dolphin mortality not fish mortality. Thus even the computation of the quota erred. The prohibition was suspended 8 days after it went into effect in 1981 and deleted in 1986.

imposition of a static, non-declining quota had to assume that characteristics and performance of the fleet would remain relatively constant. In any event, the quota would serve as a cap to ensure the stocks would not be disadvantaged if the fleet grew and performance did not improve. However, the exact opposite has occurred, as the U.S. fleet has diminished considerably without a corresponding decline in kill levels. Even as a cap the quota has failed as industry has twice exceeded the quota.

FLEET SIZE

The quota of 20,500 was first set in 1981 for a fleet of a particular size. Since then, the number of U.S. vessels actively setting on dolphins has diminished considerably. Numbering 93 vessels in 1981, the U.S. ETP fleet dropped to 34 vessels in 1986. Throughout the years, a substantial number of vessels have opted for flags of convenience, either to avoid U.S. dolphin regulations, or to lower operating costs. Others have remained in the Western Pacific after overfishing and the presence of the El Nino phenomenon forced an exodus from the ETP. If those vessels which have since reflagged but were part of the original calculation were to be included under the U.S. quota, the quota of 20,500 dolphins would have been consistently exceeded since 1981.

There is little justification for maintaining a quota of 20,500 when the fleet has been reduced by 65%. The static quota means that even if the fleet were reduced to a single vessel, that

vessel could kill 20,500 dolphins.

PERFORMANCE

A fleet which has been reduced by 65% yet continues to kill the same level of dolphins as before suggests that fleet performance has deteriorated. A variety of kill rates have been utilized to assess fleet performance. Interestingly, the only measure of performance which has improved since 1981 is the kill rate most often used by NMFS - that of dolphins killed per ton of yellowfin caught. In 1981, the rate was .32 dolphins per ton of tuna. In 1986, it was .27. It is important to note, however, that during the same time period, the denominator (tons of yellowfin caught per dolphin set) has jumped from 11 to 25 tons per set. (Table 2). The kill per ton rate is merely a measurement of fishing efficiency and has little to do with the number of dolphins actually killed. Indeed, when one factors out the greater tonnage per set, kill per ton has increased.

By all other measures, performance has declined substantially. From 1981 to 1986, the annual kill per vessel fishing has tripled from 199 to 608. Similarly, there has been a marked increase in the number of dolphins killed per ton of vessel capacity. When the effort of those vessels is considered through annual kill per fleet day, performance has worsened by a factor of 4. (Table 3)

A more standard measure of performance is the number of dolphins killed per set. This ratio has likewise worsened from 3.6 in

1981 to 6.87 in 1986. Further compounding this kill rate is industry's increased dependence on dolphin sets. In 1981, 47% of all sets made in the ETP were on dolphin. By 1985, that dependence had soared to 94%, where it remains today. A static quota has enabled the industry to actually increase its effort on dolphins.

It is important to note that kill rates, whether they reflect kill per vessel or kill per ton only serve to measure or indicate the fleet's effort and fishing efficiency. Kill per ton may actually decrease substantially, while the total number of dolphins killed increases. Most important to the dolphins is the level at which they are killed and its impact on the respective stocks - not at what rate they are killed. Since the quota of 20,500 was first set in 1981, it has been exceeded twice. In 1986, the level of dolphins killed by the U.S. fleet rivaled levels reported in 1977.

ALTERNATIVES AND TECHNOLOGY

Congress passed an amendment in 1981 which directed the Secretary to "undertake a program of, and ...provide assistance for, the research into new methods of locating and catching tuna without the incidental taking of marine mammals." (Sec 110(a)). This action clearly suggests that Congress was neither satisfied with the 20,500 quota nor the continued practice of exploiting dolphins in order to catch tuna. Despite a clear mandate, the ensuing years have been devoid of research and development on alternative fishing methods which do not involve encircling

dolphins. Rather, industry has been allowed to increase its financial dependence on dolphin sets to the point where virtually every set involves the take of dolphins.

Not only has the promotion of alternative fishing methods been non-existent, but even requirements for improved technology designed to reduce mortality have been ignored. Indeed the only innovation in technology has been the utilization of brighter lights during sundown sets. In 1985, many of the existing regulations and gear requirements were reduced to guidelines. As examples, requirements for hand rescue techniques and such things as the placement of towlines to prevent the collapse of backdown channels became guidelines. The industry could observe these guidelines if it wished but was under no compulsion to do so. Interestingly, backdown and the fine mesh panel, the only requirements not completely emasculated in this process, were developed and utilized by the fisherman prior to passage of the Act. The rationale for this relaxation of regulations was that it would alleviate industry from burdensome and restrictive regulations which might allow industry to improve on gear and procedures. In reality, it may have sent a signal to the industry that dolphin kills were no longer of major concern. The next year 34 vessels exceed the quota 9 1/2 months into the fishing year.

STATUS OF STOCKS

The major target species taken in the ETP tuna fishery are

spotted dolphin, spinner dolphin and common dolphin. Each of these species are comprised of a number of morphologically and geographically distinct subspecies known as stocks. A stock which has been reduced below its optimum sustainable population (OSP), (interpreted at 60% of its original size) is considered "depleted" and its continued take prohibited under the Act. Currently, two stocks, the eastern spinner and coastal spotted dolphin, have been so reduced by tuna fishing operations they have been designated as depleted. The tuna industry is, however, the only commercial fishery which has an exemption to this provision.

In the event that stocks are not depleted, the Act requires that continued takes will not disadvantage the stock. "This determination is made by estimating the maximum replacement yield of each stock (R_{max}) times present stock size. The replacement yield is then divided between anticipated foreign and domestic takes." (Fed Reg 1980). Inherent in the establishment of the 1981 quota and the determination that this level would not disadvantage the stocks was the assumption that "foreign caused porpoise mortality will remain unchanged or will not increase above U.S. levels during the 1981-1985 period" (FEIS 1980). Thus a level of 41,000 was determined a safe level for the combined stocks.

We believe that several of the target stocks are in serious trouble. In 1986 alone, total mortality for the combined fleets was estimated at almost 130,000 dolphins, more than three times

higher than the level presumed safe. It is suspected that this dramatic increase in overall fleet mortality is due to the increased foreign observer coverage, thus the ETP stocks may have experienced this level of take for some time. Formally declared depleted in 1976, the eastern spinner has been reduced 80% as a result of tuna fishing operations. In 1986, another estimated 16,000 eastern spinners were killed from a population estimated at between 200,000-600,000 (SWFC Admin. Rep. LJ 85-20, 1985). This is cause for grave concern because the reproduction and natural mortality rates of this species are unknown. It should be noted, though, that the status of this species was considered to be so poor that there is an absolute prohibition against setting on pure schools of eastern spinners, and there is a cap of 2,750 animals for the U.S. fleet.

Much dispute has surrounded the status of the primary target stock, the northern offshore spotted dolphin. In 1979, NMFS reported that this stock was below OSP at 34-55% of its pre-exploited population, however NOAA later ruled that this stock was at 63% just enough to place it within the boundaries of OSP. A court directive resulting from an industry initiated lawsuit (ATA v Baldrige) led to a virtual doubling in all target stock sizes. These are the figures utilized today by the agency, despite additional later findings by others which warrant concern. The IATTC has reported a further decline in this stock since the controversial rulemaking in 1979.

NORTHERN OFFSHORE SPOTTED
(in millions)

	Original Population	1979 Population	1979 Status	1986 Population
NMFS 1979	5.00-7.00	2.33-2.67	34-55%	
NOAA 1980	5.00	3.15	63%	
NMFS/Court	7.19	6.12	85%	
Smith 1983	4.80-5.60	1.68-2.78	35-50%	
IATTC 1986	NA	3.59	NA	3.34

Such data clearly indicate that even in the case of the major target stock a high degree of uncertainty continues to exist over the status of dolphin populations exploited by the tuna industry.

An estimated 67,000 offshore spotted dolphins with a replacement yield of only 83,000 (FEIS 1980) were killed in 1986 alone. We have heard that more recent estimates made by NMFS place the current population of northern offshore spotted dolphins at an alarming 900,000 to 1 million animals. Maximum replacement yield for this stock would optimistically be 40,000 animals. Recent studies show declines in several of the stocks over the last decade. The most dramatic decline observed, the southern offshore spotted dolphin stock may have been reduced by 80% in the last ten years (IATTC 1986).

Even at face value, the mortality figures and subsequent impact these levels may have on the the stocks are alarming. We believe, however, that mortality estimates issued by NMFS and the IATTC are but a fraction of the actual lethal take. No provisions are made for "observer effect", i.e., vessels without observers are considered in the calculations to operate in the same manner as vessels carrying a federal enforcement agent or an IATTC technician. Vessels with observers are subject to citation for violations of regulations. Further, data from observed vessels is extrapolated into the unobserved fleet, creating an incentive to reduce observed kills. Crooms (1980) reported that dolphin mortality was significantly higher on vessels not carrying observers than on vessels where observers were present.

In addition, no provisions are made in mortality estimates for cryptic kills, i.e., animals released from the net which may later die from shock, stress or unseen injuries. Over 2 million animals are taken each year by the U.S. fleet alone. Some animals may be taken several times in a day. Even if only a small percentage of animals later succumb, the number would be significant.

NMFS, with its dual responsibility to maintain a lucrative fishery while simultaneously protecting dolphins, has shown a consistent bias in favor of industry. Indeed, as viewed by the agency "The National Marine Fisheries Service (NMFS) is committed to achieving effective protection of porpoise with the least disruption of the specific operations of tuna operations" (Letter

from C. Fullerton to L. Scheele 2/6/1986). It should be noted that this statement was made immediately after regulations to protect dolphins had been reduced to guidelines.

Despite recent population estimates to the contrary, NMFS continues to utilize the highly optimistic figures which resulted from the court directive. Although reported kill levels are far in excess of what the agency deemed safe in 1981, no re-evaluation has been done on the stocks. NMFS continues to utilize a maximum net recruitment rate of 4%, a highly optimistic figure for severely reduced cetacean stocks, and the subject of much debate within the International Whaling Commission.

MONITORING PROGRAM

In 1984 the general permit issued to the ATA and the quota of 20,500 were extended indefinitely. In large part this was due to the controversy which continued to surround the status of stocks and attempts by all parties involved to avoid lengthy and costly rulemaking procedures. Congress, the environmental community and the public, however, had been assured that a five year monitoring program would detect problems. If the continued taking was to the disadvantage of the stocks, quotas or regulations would be adjusted accordingly. But rather than basing the survey on original population levels, it was based on detected declines that occurred after the start of the survey. It is now apparent that the five year monitoring program cannot ensure timely detection of continued declines. Holt (1987) reports that the

monitoring program "will only allow us to detect a 13% annual decline in spotted dolphin abundance. This means that the population could decline by 50% during the survey period before it could be detected." Results from the first year of the survey are even more bleak than anticipated. NMFS reports that even larger reductions in populations will have to occur before they can detect a change with any confidence. This may be due to the low number of dolphins encountered during the survey.

Congress intended the Act to be administered for the benefit of marine mammals rather than the benefit of commercial exploitation. The legislative record states, " Before issuing any permit for the taking of a marine mammal, the Secretary must first have proven that any taking is consistent with the purposes and policies of the Act-that is to say, that any taking will not be to the disadvantage of the animals concerned. If he cannot make that finding he can not issue a permit. It is that simple." (Congressman John Dingell, Congressional Record, Dec 6, 1971, p. HR 10402). The debate and uncertainty which surrounds the status of stocks is cause enough to dictate that we err on the side of caution when making assessments of the impact of the tuna industry. With levels of take far in excess of those deemed safe in 1981, and with the inability of the monitoring program to detect further reductions in a timely manner, the present system cannot ensure the viability of the stocks.

CONCLUSION

It has been thirty years since the practice of setting on dolphins in the eastern tropical Pacific became established. It has been 16 years since the Marine Mammal Protection Act was first passed. Tuna fishermen have had ample opportunity to improve their practices, but over the last decade little has been done to seriously effect regulations in dolphin mortalities. The number of dolphins being killed in this fishery remains a serious problem, but both the tuna industry and NMFS have demonstrated an inability or unwillingness to address it.

Much has been said about rates, but as long as dolphin deaths remain a function of fishing effort, we will never be able to guarantee that the combined fleets will not seriously deplete dolphin stocks. The bottom line remains the number of dolphins actually killed and the impact of the fishery on specific stocks. By this measure, conditions have not improved for over a decade.

As groups concerned about the impact of this fishery on dolphin stocks, we feel that the time has come to return to the original goal of the Act and mandate a zero mortality level. We would point out that this carnage is not an "incidental" take--it is an intentional take. Unlike other fisheries with marine mammal kills, these dolphins are not passively taken when they encounter fishing gear. Rather, it involves a take which is deliberate under the definition of "take" in the Act. It is a purposeful hunting, harassment, capture and, in some cases, killing of marine mammals.

It has become apparent that no improvements should be expected, and unless a major change of direction is taken unacceptably high numbers of dolphins will continue to be killed. The Congress has stated that the immediate goal of the Act is that commercial fishing operations reduce kill levels of marine mammals to levels approaching a zero mortality rate. It is our opinion that the intentional take of massive numbers of dolphins in the tuna fishery is inconsistent with such a goal. Sixteen years after the Act was passed it is time for the practice of setting on dolphins to be stopped.

In order to allow the fleet, the processors, and NMFS the opportunity to find alternatives, we would consider, as a minimum requirement, a reduction of the mortality quota to zero over a four year period. Reducing the quota in straight-line increments of 25% a year would eliminate the killing of dolphins by the purse seine tuna fleet by 1992.

There are several reasons why such an action is justified. First, performance by the U.S. fleet has deteriorated since a static quota of 20,500 was set in 1981. Second, there is evidence that specific stocks of dolphins are in serious trouble. Combined with the difficulty to detect changes of less than disastrous proportions in the short term, massive dolphin kills cannot be scientifically justified. Finally, it seems to be inevitable that the performance of the United States fleet will

serve as the baseline for any regulation of the foreign fleet. Even if the foreign fleet were to perform at levels equal to those of the U.S. fleet, the change in the composition of the fleet since 1981 would mean that approved kill levels could be beyond the biological capacity of the stocks and beyond the acceptance level of the American public. If the interim final regulations become permanent, we will be codifying a quota of a minimum of 65,000 animals for the combined fleets.

NMFS has consistently argued that tighter constraints on the killing of dolphins would force tuna fishermen to seek non-U.S. markets thereby avoiding all regulation. In addition to being an excuse for not taking any action even if it is warranted, this argument is fallacious. The United States is such a large portion of the total market for tuna from the ETP that replacement of such a portion of the market would be unrealistic. Second, the major alternative market for tuna is within the European Economic Community and beyond its limited capacity to absorb tuna which would normally have been shipped to the United States, there are additional indications that it may not be as accessible as a market in the future. On April 13, a motion for resolution was introduced in the European Parliament which could result in a total ban of tuna caught by setting on dolphins. The motion has received support from representatives of each of the parties within the Parliament and is being sponsored by the chairs and vice chairs of the two committees which have jurisdiction .

I would hope that in four years it will not be necessary to give a post-mortem on species of dolphins in testimony before this subcommittee. Having talked with some of the scientists who work with these species, I know that they think such a scenario is not beyond the realm of possibility. I would like to quote two sentences from an editorial comment of the May, 1987, IUCN Newsletter of the Cetacean Specialist Groups: "There seems to be little hope for solution of the dolphin/tuna problem...The situation is reminiscent of whaling before the advent of the IWC; it may become yet another 'tragedy of the commons'." This tragedy can only be prevented if we follow through on a commitment made 16 years ago and prevent the deaths of dolphins in this fishery.

TABLE 1
ANNUAL MORTALITY FOR US AND NON-US FLEETS

YEAR	US KILL	US QUOTA	FOREIGN KILL	TOTAL
1959				55,000
1960				478,000
1961				534,000
1962				216,000
1963				240,000
1964				390,000
1965				460,000
1966				374,000
1967				257,000
1968				229,000
1969				461,000
1970				467,000
1971	246,213		15,719	261,932
1972	368,600		55,078	423,678
1973	206,697		58,276	264,973
1974	147,437		27,245	174,682
1975	166,645		27,812	194,457
1976	108,740	(78,000)	19,482	128,222
1977	25,452	(62,429)	25,901	51,353
1978	19,366	(51,945)	11,147	30,513
1979	17,938	(41,610)	6,837	24,775
1980	18,573	(31,150)	30,978	49,551
1981	18,520	(20,500)	16,516	35,036
1982	23,267	(20,500)	5,516	28,783
1983	9,589	(20,500)	[17,759]	[27,348]
1984	17,732	(20,500)	[26,252]	43,984
1985	19,205	(20,500)	[37,505]	56,710
1986	20,692	(20,500)	[108,767]	129,459
1987	13,992	(20,500)	NA	NA
TOTAL				6,059,108

1959 to 1970 N. Lo and Smith, 1986; 1971 to 1979 NMFS, FEIS, Nov 1980; 1980 to 1981 IATTC Annual Report 1982; 1982 IATTC Annual Report 1983; 1983 to 1986 for US fleet Annual Report of the MMC, 1986. Total kill figures for 1984-1986, IATTC Annual Report 1984, 1985, 1986.

Numbers in { } were arrived at by subtracting U.S. estimates from IATTC total fleet estimates.

Numbers in [] are only rough approximations, arrived at from extrapolation of IATTC (1984) data for kill average 1979-1983 Annual Report and should not be used.

TABLE 2

U.S. PERFORMANCE SINCE QUOTA OF 20,500

	YEAR					
	1981	1982	1983	1984	1985	1986
No. of Certified Vessels	93	89	60	34	36	34
Kill per Ton	.32	.46	.30	.30	.25	.27
Tons of YF on dolphin	11	11	11	18	19	25
Kill per Set	3.61	5.18	3.20	5.52	4.69	6.79
% of Dolphin sets	47	49	55	79	94	94

Source: Summary Statistics 1981-1986, Porpoise Rescue Foundation,
Jan 9, 1987.

TABLE 3

U.S PERFORMANCE PER VESSEL AND EFFORT

	YEAR					
	1981	1982	1983	1984	1985	1986
Est. Mortality	18,520	23,267	9,589	17,732	19,205	20,696
Cert. Vessels	93	89	60	34	36	34
Kill/Vessel	199	261	159	521	533	608
Capacity *	107,272	104,120	77,532	46,458	45,113	41,550
Kill/Ton of Capacity	.173	.223	.124	.382	.426	.498
Fleet Days	19,057	17,559	10,263	6,191	6,459	4,886
Kill/Fleet Days	.97	1.32	.93	2.86	2.94	4.24

Source: Porpoise Rescue Foundation, Summary Statistics Jan 9, 1987; Environmental Assessment, Nov. 1987.

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BACKGROUND PAPER ON THE
EASTERN TROPICAL PACIFIC TUNA/DOLPHIN ISSUE
APRIL, 1988

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R E C Y C L E D P A P E R

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INTRODUCTION

For reasons not yet understood, large schools of yellowfin tuna swim beneath herds of dolphins in an area known as the eastern tropical Pacific (ETP). This association has been exploited by tuna fishermen for some time, but it was not until the late 1950s that gear modifications made it possible for the practice of setting purse seine nets around dolphins. It is estimated that over 6 million dolphins have died since 1959 as a result of yellowfin fishing operations. (See Appendix, Table 1).

Setting on dolphins is not the only method which can be used to catch yellowfin in the ETP. The same association exists with floating objects such as logs, and setting on such objects has been utilized. In addition, yellowfin can be taken by "school fishing", i.e., setting on unassociated schools.

A major factor in the original passage of the Marine Mammal Protection Act (MMPA) in 1972 (16 U.S.C. 1361 et seq) was public concern over the huge number of marine mammals killed during tuna purse seine operations. At the time, approximately 300,000 dolphins were being killed annually. The goal of the Act as defined by the Congress was to reduce kills to "...insignificant levels approaching a zero mortality and serious injury rate...." (16 U.S.C. 1371(a)(2)). At that time the fleet consisted primarily of U.S. vessels.

As quotas were subsequently established and kill reduction gear and techniques were required, substantial reductions in mortality occurred. Since 1977, however, kill levels in the domestic fleet have remained relatively constant averaging 19,000 dolphins annually. Over the last few years a deterioration has been apparent. Despite a 70 percent reduction in the number of U.S. vessels setting on dolphins, the U.S. fleet exceeded the established quota of 20,500 before the end of 1986. Total mortality levels approached those recorded a decade earlier. When the cumulative impact of both the domestic and foreign fleets is considered, the number of deaths in 1986 exceeded the level of every year since 1976, and has been estimated at between 124,000 and 130,000.

The primary reason for the management of marine mammals is to "...maintain the health and stability of the ecosystem..." (16 U.S.C. 1361 (6)) but the exploitation of dolphins by the purse seine fleet has resulted in the decline of several dolphin stocks. Two have been designated as depleted, and the status of a third is highly questionable. Further, there has been periodic overfishing of yellowfin stocks. Protection of the ecosystem grows more remote as unregulated foreign vessels continue to enter the fleet, and flag changes by U.S. vessels continue. Today foreign vessels comprise 68 percent of the fleet and account for 85 percent of the dolphin mortality.

Far from being resolved the problem which Congress attempted to address 16 years ago is still with us, and the situation in the ETP has continued to deteriorate as the MMPA and the regulations

have been systematically weakened in order to accommodate the tuna industry. Overcapitalization and overfishing, coupled with a worldwide glut of tuna, have led to a financially troubled industry which has become increasingly dependent upon the higher market prices paid for yellowfin caught in dolphin sets.

Ironically, the practice of fishing on dolphin has international implications beyond the tuna/dolphin issue. Icelandic officials have used the number of deaths of smaller cetaceans in the tuna fishery to counter arguments that they should cease their whaling operations and observe the international moratorium on commercial whaling.

HISTORY OF THE EASTERN PACIFIC TUNA FISHERY

Since the 1920's, there has been a significant fishery for tuna in the eastern Pacific Ocean. The primary target species have been yellowfin (Thunnus albacares) and skipjack (Katsuwonus pelamis). Until the late 1950's, the majority of tuna was caught on hooks from bait boats and longliners. Such vessels were small and usually fished within 200 miles of the mainland or in the vicinity of offshore islands such as the Galapagos. Bait boats dominated the fishery with 80 percent of the total capacity. The few purse seiners which did exist were small, with capacities of 200 tons or less, and of minor importance to the fishery overall.

Even in the early years of this fishery, fishermen were aware of the strong associative bond between yellowfin tuna and dolphins.

Dolphins creating surface disturbances, often accompanied by birds overhead, were used by fishermen to locate schools of tuna. Bait boats would then chum the waters with live bait. When the yellowfin attained a feeding frenzy, hooks would be lowered. The dolphins, able to detect the hooks with their sonar, were not harmed and were "rewarded" for their assistance as they fed on the live bait. Thus there was a symbiotic relationship between the fishermen and the marine mammals. Some attempts were made to set purse seines in the vicinity of dolphins but they often evaded the nets during the sets, taking the tuna with them. When successful sets took place, the catch was normally only a small portion of the entire school, but it would exclusively yield yellowfin of a larger size than obtained from unassociated school or "log" sets.

By the late 1950's several mechanical and technical innovations had been developed which affected the efficiency of the purse seiners and subsequently the entire ETP tuna fishery. Chief among these was the development of the Puretic hydraulic power block which allowed for the rapid recovery of much larger nets. Net materials also changed as lighter woven nylon with greater tensile strength was utilized. It permitted faster net sinkage and decreased retrieval time. Larger nets--up to 3/4 of a mile long and over 300 feet deep--allowed the seiners to intentionally encircle entire dolphin herds. Speed boats were introduced to chase, herd, and confine the dolphins while the net was set. The result of these changes was record landings of valuable yellowfin and massive dolphin mortalities. In 1959 it was estimated that

590 sets were made on dolphins. The next year the total jumped to 5,400 (IATTC, 1981) and was coupled with the highest yellowfin catch per standard day of fishing ever recorded.

Realizing that bountiful catches and profits awaited those willing to exploit the tuna-dolphin bond, the nature of the fishery changed dramatically. Bait boats, unable to compete, were quickly converted into purse seiners or left the fishery. Speed boats to herd dolphins became standard equipment. Fixed wing planes, operating from shore, were used to radio the location of dolphin herds. As early as 1961, on-board helicopters were introduced to further reduce the time spent searching for dolphins. Almost overnight the industry had become so efficient that in 1961 the Inter-American Tropical Tuna Commission (IATTC) expressed concern over the status of yellowfin stocks (IATTC, 1981).

The procedures used to set on dolphins are much the same today as when the fishery first began to exploit the associative bond. When a herd of dolphins is spotted, three or more speed boats are launched from the seiner. The speed boats travel behind the seiner until the larger vessel is considered close enough to the herd. The speed boats then race ahead and attempt to surround the dolphins and stop their forward movement. By this time the dolphins have begun to run--an avoidance behavior that rarely works to their advantage because their movement is linear, predictable, and very exposed. Wakes from the speed boats and

the boats themselves are utilized to compact the herd and bring it to a stop. The chase may continue for up to 90 minutes. When the herd is stationary, net deployment begins. A skiff containing one end of the net is launched from the stern. The net is released as the seiner moves counter-clockwise around the dolphins. Rings attached to the bottom of the net are threaded with a cable which is pulled when the encirclement is complete. This completes the purse and seals off the escape route for both dolphins and tuna. While physically capable of doing so, dolphins do not leap over the corkline (possibly because of exhaustion); deep or lateral escape attempts can result in flipper, rostrum (beak), and fluke entanglement. As voluntary air breathers, entangled dolphins suffocate. Other dolphins may literally be crushed by the weight of the tuna, or by passing through the power blocks, during net retrieval.

The hundreds of thousands of dolphins killed each year were of no commercial value to the fishermen. Indeed, the massive dolphin mortality was an unfortunate and costly bycatch. Valuable fishing time was lost sorting dolphins from tuna on deck or extracting carcasses from the net. Furthermore, a dead dolphin could not be used to locate and catch tuna at a later date. The fishermen realized that reducing mortality was in their best interest as it could create more active fishing time and allow for continued exploitation of the associative bond.

The "backdown" procedure was developed by fishermen in the early sixties, and it is still the single most significant contributor

to mortality reduction. Backdown begins when 1/2 to 2/3 of the net has been retrieved. The vessel reverses direction, causing the net to elongate into a narrow channel. Water flow sinks the corkline at the far end allowing dolphins to pass over the net. Manned rafts, stationed in the backdown area, further assist the dolphins to escape. If the tuna attempt to follow, the vessel is stopped, and the corkline is raised. Backdown can thus involve several stages.

While backdown greatly reduced the mortality of trapped dolphins, many still became entangled in the narrow backdown channel. The next major innovation to deal with this problem was developed by Captain Harold Medina. In 1971 vessels began to replace the uppermost part of the net with finer mesh, greatly decreasing the chances of flipper and rostrum entanglement. It should be noted that both the backdown technique and the finer mesh panel were developed before the initial passage of the Act. Both are currently required and continue to be the primary methods for reducing mortality.

From the late 1960's to the mid 1970's there was a rapid overexpansion of the ETP fleet as new vessels were constructed for both domestic and foreign fleets. These "super seiners", capable of catching, storing, and processing close to 2,000 tons of tuna while remaining at sea for months at a time, replaced the original seiners and converted bait boats. From 1965 to 1980, total fleet capacity grew from 48,673 tons to 189,426 tons and

far exceeded the availability of the yellowfin resource. Catch per standard day of fishing (CPSDF) had dropped from 8 tons in 1960 when setting on dolphins began in earnest to 2 tons in 1980. (IATTC, 1981). In 1980, with a recommended available harvest of 210,000 tons of yellowfin, the resource was capable of withstanding an average of only slightly more than one fishing trip per vessel. Yet vessels of 1,000 ton capacity or more required at least two and one-half successful trips annually just to break even (Joseph, 1979). Both the yellowfin stock and the fleet itself faced the possibility of collapse.

In 1983, the yellowfin catch was the lowest since 1967. Severe overfishing, coupled with the El Nino phenomenon, forced many vessels to leave the ETP for the western Pacific and a healthier yellowfin stock. It was an expensive exodus. Tuna in the western Pacific are found at greater depths and costly net modifications were required. This deeper dwelling stock does not associate with dolphins. The combination of a shortage of tuna in the ETP and the relocation of a significant portion of the fleet led to a reduction on fishing effort on dolphins, and dolphin mortalities caused by the U.S. fleet reached an all time low of 9,589. With reduced fishing pressure, tuna stocks began to rebound. Vessels began to return in 1985 and 1986, and the yellowfin catches were the highest ever recorded in the ETP. The respite may have permitted recovery of the yellowfin stocks but dolphins have a much slower reproductive rate. It is unlikely that this two year hiatus was sufficient to permit a significant recovery of the exploited dolphin stocks.

FLEET COMPOSITION

When setting on dolphins with purse seines began in earnest in 1960, U.S. vessels comprised 99 percent of the ETP fleet. That dominance has now dwindled. Foreign vessels have entered the fishery and many U.S. vessels have transferred registration to other countries in order to avoid mortality-reducing regulations or to cut fuel and labor costs. Between the passage of the Act in 1972 and 1980, 27 vessels transferred to foreign registry. (ATA Comments, DEIS, 1980). In 1984 alone, 10 vessels transferred flags. (FEIS, 1985). For instance, by 1985 the three vessel fleet of Vanuatu consisted entirely of U.S. flag transfers (51 Fed. Reg. 39901). Other U.S. vessels did not return from the western Pacific, thus further diminishing the U.S. fleet in the ETP. Simultaneously, new vessels were constructed by the fleets of other nations, who were anxious to capitalize on the tuna/dolphin bond. In 1986, only 34 of the 103 purse seiners setting on dolphins in the ETP were of U.S. registry. Mexican registrations now dominate the fleet with 43 vessels. The other vessels setting on dolphins in the ETP are from Venezuela (15), Ecuador (4), Vanuatu (4), Spain (2), and the Cayman Islands, Costa Rica, El Salvador, and Panama with one vessel each. (Environmental Assessment, November, 1987).

THE MARINE MAMMAL PROTECTION ACT OF 1972

It was not until 1970, a decade after purse seiners began to be used extensively in the ETP, that the exploitation of dolphins

entered the realm of public awareness. By that time an estimated 3.2 million dolphins had been killed. The ensuing public and congressional outrage provided the major impetus for the passage of the Marine Mammal Protection Act. At the time, the U.S. fleet was responsible for over 90 percent of the kill; legislation designed to reduce U.S. kills to zero would therefore have a major effect on subsequent mortality. Since the passage of the Act, however, fishing effort has shifted to the foreign fleet, and the goal of a kill approaching zero has been repeatedly compromised.

The MMPA officially became effective on December 21, 1972. Although the legislative process had attempted to accommodate disparate views ranging from doing nothing to complete protection, what emerged was a milestone in wildlife legislation which went far beyond the borders of the United States in its impact. It provided momentum for the passage of the Endangered Species Act the following year. It is still used as a model for national legislation elsewhere in the world. Perhaps most importantly, it signaled a strong U.S. commitment to preserving marine mammal populations. If the Act were to be weakened, it would send an unfortunate signal to other countries where marine mammal populations are still imperiled.

The Act placed an immediate moratorium on the taking and importation of marine mammals and marine mammal products. At the same time, it allowed exceptions so long as they were consistent with the goal of protecting marine mammals. Prohibitions and

restrictions were placed on the intentional kill, incidental kill, and even harassment of marine mammals.

Congress stated in its findings that "...certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities", and as a matter of policy "they should not be permitted to diminish below their optimum sustainable population" (16 U.S.C. 1361(2)). The Act further directed that "...measures should be immediately taken to replenish any species or population stock which has already diminished below its optimum sustainable population" The Secretary of Commerce was given the duty of implementing these goals for all cetacean species and all pinniped species except walrus.

While the Act called for an immediate moratorium, a two year exemption or grace period was extended to commercial fishermen subject to interim regulations which required the use of fishing techniques which produced the least practicable hazard to marine mammals. The legislative history indicates that this exception was allowed after assurances by the tuna industry that a solution to dolphin mortality had been found. At the time, the two year grace period was considered to be an opportunity for the tuna fishermen to develop solutions which they had indicated were already on line. These solutions involved refinement and total deployment of procedures and gear modifications developed by the fishermen themselves.

Section 101(a)(2) of the original Act provided that at the end of the two year period any further take of marine mammals would only be allowed after the issuance of a permit and would be subject to regulations promulgated to carry out the basic goals of the Act. "In any event, it shall be the immediate goal that the incidental take or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." (16 U.S.C.1371(a)(2)). Furthermore, except for scientific research purposes, "...no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted...." (16 U.S.C.1371(a)(3)(B)).

Congress laid out explicit guidelines to be considered before the promulgation of regulations or the issuance of permits. Regulations must "...insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with section 2 of the Act" (16 U.S.C.1373(a)). Section 2 provides, among other things, that such species and population stocks "...should not be permitted to diminish below their optimum sustainable population." (16 U.S.C.1361(3)). In addition, Congress required the Secretary to publish certain statements before regulations could be issued. These included:

- "(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

- (2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;
- (3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations." (16 U.S.C.1373(d)(1)-(3))

PERMITS AND REGULATIONS 1972 - 1976

During the two year grace period, over 350,000 additional dolphins were killed by the U.S. tuna fishery (see Table 1). Industry promises that a solution to the problem would be found proved to be empty. In March, 1974, the National Marine Fisheries Service (NMFS) published a notice of intent to prescribe regulations for the issuance of a permit to allow the continuation of the taking of marine mammals by the tuna fishery. The proposed regulations required the use of the backdown, the installation of a finer 2 inch mesh panel, and the use of hand rescue techniques. Each of these was supposedly already being used voluntarily. The existing populations were listed as "unknown" as was the impact on the OSP of each stock that a continued take would have. The American Tunaboat Association (ATA) applied for and was granted a General Permit which allowed fishermen to take an unlimited number of dolphins from October 21, 1974, to December 31, 1975. Apparently by shifting the focus from the legislative to the regulatory arena, it was possible to completely reverse the goals of the Act.

The environmental community immediately challenged this first general permit. (Committee for Humane Legislation v. Richardson, 414 F.Supp.297(DCDC)aff'd.540 F.2nd 1141 (D.C. Cir.1976)). The suit charged among other things that NMFS ignored a specific statutory mandate by not providing specific determinations on the populations of affected stocks as required by the Act. On May 11, 1976, Judge Charles Richey of the U.S. District Court ruled that the MMPA did not authorize the issuance of a general permit in such a manner. Judge Richey stated, "The MMPA does not direct the [NMFS] to afford porpoise only that amount of protection which is consistent with the maintenance of a healthy tuna industry. The interests of the marine mammals come first...." (Supra 414 F.Supp at 309).

He quoted with approval the House Committee Report which stated, "The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not the benefit of commercial exploitation." (Supra, 414 F. Supp at 307 N.24)(Emphasis in original).

Richey further ruled that before the agency can prescribe regulations for the taking of marine mammals, it must be assured that the expected impact of such regulations on the optimum sustainable population of the species involved is not to the disadvantage of the animals. Lack of information did not give NMFS the authority to issue carte blanche permits. Indeed, Richey expressed the view that Congress had foreseen that such

situations would arise and quoted House Subcommittee Chairman John Dingell: "'Before issuing any permit for the taking of a marine mammal, the Secretary must first have it proven to his satisfaction that any taking is consistent with the purposes and policies of the Act--that is to say that taking will not be to the disadvantage of the animals concerned. If he cannot make that finding, he cannot issue a permit. It is that simple."

(Supra, 414 F.Supp at 310) (Emphasis by the court).

Additionally, Richey's decision reinforced the statutory requirement for stock specific quotas (16 U.S.C.1374(b)(2)(A)). Any permit issued under the Act must specify "the number and kind of animals which are authorized to be taken...." (Supra, 414 F.Supp. at 303,313). NMFS had "...violated this explicit statutory command..." by issuing an unrestricted permit to the ATA. (Supra, 414 F.Supp at 313).

Citing that NMFS had "...violated specific requirements of the MMPA and consistently misinterpreted the general mandate of the act....", Judge Richey overturned the permit and ordered the practice of fishing on dolphins to cease effective May 31, 1976 (Supra, 414 F.Supp at 313). The Court also ruled that no general permits authorizing such takes be granted until the OSP of each species or stock was determined together with the effects of such take.

NMFS and ATA appealed the decision and the agency stated its intention to impose a quota for 1976, determine levels for all

stocks and institute a mandatory observer program. The Court of Appeals for the District of Columbia sustained the original finding but granted a stay of the order until January 1, 1977. The Appellants request for an extension of the Stay was denied (Committee for Humane Legislation v. Richardson, S4OF 2nd 1141 (D.C.Cir 1976)).

Amended emergency regulations for 1976 prescribed an aggregate quota of 78,000 dolphins and required vessels to carry federal observers to obtain mortality estimates and enforce regulations. On October 19, 1976, the quota was reached and a prohibition of encircling dolphins was announced. This action led to further litigation as ATA successfully obtained a temporary restraining order which effectively delayed implementation of the closure date until November 11, 1976. Mortality estimates for 1976 reached 108,000.

It was clear from Richey's decision that future quotas would have to be based on a stock-by-stock basis. To comply with this requirement of the Act, NMFS convened the first Status of Porpoise Stocks workshop (SOPS) in June of 1976. Results of this workshop would form the scientific basis to establish future quotas on those stocks exploited by the fishery. Before such assessments could be made, a working definition of OSP was needed. SOPS defined Optimum Sustainable Population to be:

"A population size which falls within a range from the population level of a given species or stock which is the

largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers of biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality."

NMFS chose a range of numbers to define OSP. The maximum net productivity (MNP) level or the lower point of OSP was considered between 50 and 70% of the stocks "initial" (unexploited) population level. Stocks below 50% would be below their OSP and would thus be considered depleted.

Of the 13 species involved in the fishery, NMFS was able to make determinations for all but four. Most importantly, the eastern spinner was found to be below OSP and, therefore, depleted.

THE 1977 REGULATIONS

Utilizing information from the SOPS workshop, NMFS proposed 1977 regulations in October, 1976. These regulations were the subject of extensive public hearings and administrative hearing before an Administrative Law Judge. The regulations set separate quotas for 12 stocks with the total aggregate quota of 62,429. Encircling the depleted eastern spinner or the four unassessed stocks was prohibited under the Act. In addition, the agency set limits on the number of animals that could be taken by harassment

through chase and through encirclement. The permit further required the reduction of the fine mesh panels to 1-1/4" mesh, the use of floodlights during sundown or evening sets and the use of a manned raft complete with snorkel gear during backdown. NMFS also made known its intention to place a federal observer aboard on at least one trip of each of the U.S. fleet's 130 vessels.

Both industry and the environmental community challenged the legality of the 1977 general permit conditions. Industry claimed the determination of depleted status for eastern spinners was unsupported and over-reactive. They also claimed that identifying eastern spinners in mixed herds could be difficult prior to encirclement and might result in penalties for "accidental" harassment and mortality, and that the proposed quota on whitebelly spinners was too restrictive.

The U.S. fleet, to underscore their dissatisfaction, went on strike and remained in port until May. In response, NMFS issued an enforcement statement which effectively allowed for the "accidental" take of the depleted eastern spinner. Such accidents would not be subject to prosecution ...nor would such accidents be applied against the total aggregate quota.

The environmental community claimed that the quota of 62,429 did not satisfy the "immediate goal" of the Act. (Committee for Humane Legislation v Kreps). Judge Richey denied the motion for

a preliminary injunction finding that all supporting data had been provided and that the OSP and quotas for individual stocks had been determined.

PERMITS AND REGULATIONS 1978 - 1980

In 1977, NMFS again proposed to amend regulations. However, rather than continue to issue a general permit and subsequent regulations annually, NMFS proposed a three year permit for 1978 through 1980. Quotas would be reduced on a sliding scale until the aggregate quota for 1980 approached a 50% reduction from the 1977 quota.

Aggregate total quotas for 1978-1980 respectively were 51,945, 41,610 and 31,150. Specific quotas for striped dolphins, previously prohibited due to the lack of a determination on status, were granted as NMFS had assessed these stocks to be within their OSP boundaries. The proposed regulations were, once again, the subject of an Administrative Law Hearing. Among other conclusions, the ALJ found that the eastern spinner still warranted a depleted status. While NMFS had placed the eastern spinner at 55% of its pre-exploited level and, therefore, above the lower boundary of OSP, the ALJ preferred to adopt the midrange of 60% as the lower boundary of OSP. Consideration was also given to undetected mortality resulting from serious injury, or the so called "cryptic kills". Additionally, recent work by William Perrin of NMFS suggested that the gross reproductive

rate for spinners was lower than that of the spotted dolphins. For these reasons the ALJ determined that a cautious approach was warranted.

The ALJ rejected the industry's demand for a continued three year annual quota of 78,000 as inconsistent with the immediate goal requirement of the Act. Additional gear requirements, improved by the regulations, included the installation by all vessels of the super apron net developed by NMFS gear program, and the arrangement of toelines to prevent net collapse and canopies where animals become trapped under the net.

In expectation of an industry request for future permits after 1980, NMFS convened another workshop in 1979, involving 29 scientists from around the world, to discuss the status of dolphin stocks. The workshop concluded that the Maximum Net productivity (MNP) level (or lower boundary of OSP) was between 60 and 85% of the initial population. This represented a change from the 1976 SOPS range of 50-70% reflecting a change in theory that maximum net productivity in larger mammals is non-linear and therefore approaches the carrying capacity of the stock. The workshop also concluded that the maximum net reproductive rate values ranged from 0-4% as opposed to earlier conclusions of 2-6%. Cryptic and seriously injured animals were also considered. Results of the workshop showed the northern offshore spotted to be at 35-55% of its pre-exploited level and the eastern spinner at 16-21%. The coastal spotted dolphin was considered at the

upper limits of its OSP range. Of grave significance to the industry was the finding on northern offshore spotted: the population was below OSP and therefore depleted. Under the Act, all takes would be prohibited. As over 90% of the tuna caught on dolphins involved pure or mixed herds of the northern offshore spotted, the fishery would either be forced to abandon their method of catching tuna or rely on non-depleted, non-traditional target stocks.

Proposed regulations pursuant to this finding were promulgated on February 15, 1980, and a formal hearing conducted by ALJ Hugh Dolan began in March. The ALJ reviewed both the findings of the workshop and the proposed regulations, which included prohibition on the setting on pure or mixed schools of northern offshore and coastal spotted dolphins, and eastern and Costa Rican spinners, until Dec. 1981. No accidental takes of spotted dolphins were to be allowed as these animals were not found as individuals within larger herds. In addition a prohibition on sets at night, known as "sundown sets" was proposed due to the extremely high mortality inflicted during these sets.

The ALJ ruled that the evidence did not warrant a change from 1977 OSP or Rmax levels and found them to be 50-70% and 4% respectively. Dolan would not, however, rule on the status of the northern spotted based upon the data presented and the ramifications such a finding would have on industry. This determination was thus left to the Administrator of NOAA, Richard Frank. He ignored the findings of SOPS that the lower boundary

of OSP was 60% of initial population size. He further determined the offshore spotted to be at 63% of its pre-exploited population, just enough to "save" it and industry from a finding of depletion. He further determined that the workshop had erred in apportioning historical mortality and shifted mortality from offshore spotted to coastal spotted. This led to a ruling of depletion for the coastal spotted, estimated by SOPS to be at carrying capacity and not a target of the U.S. industry. Frank ruled the eastern spinner warranted depleted status and a zero quota was set with the accidental proviso intact.

Quotas and the length of permit now needed to be addressed. Frank chose the highest catch of yellowfin for preceding years (93,000 tons) and considered a kill per ton rate of .24 to be achievable. This resulted in a quota of 22,320 which was then modified downward by 8.5% to reflect the lost yellowfin catch created by a prohibition on sundown sets. This resulted in the quota of 20,500. $(22,320 - [(93,000 \times .085) \times .24])$. Frank, however, failed to take into account that the dolphin kill rate during sundown sets is far greater (3-4 times higher) than the average kill per ton of .24. For example, in 1979 sundown sets accounted for only 10% of the total yellowfin catch, while causing 35.5% of the total dolphin mortality. (ALJ, 1979). Therefore, if the quota was to truly reflect the impact of a ban on sundown sets, the quota of 22,320 should have been modified utilizing dolphin mortality as opposed to fish mortality. This could have resulted in a quota of 15,680 dolphins: $22,320 - [(93,000 \times 8.5) \times (.24 \times 3.5)]$.

Frank further extended this erroneous quota of 20,500 for the next five years in full contravention of the immediate goal of the Act and several court interpretations of same. Either coincidentally or ironically, from 1977 through 1980, the annual average mortality was 20,332.

The 1980 FEIS stated that the proposed quota of 20,500 would not disadvantage the stocks. "This determination assumes that the foreign caused porpoise mortality will remain unchanged or will not increase above the expected U.S. levels during the 1981-1985 period." In 1986, the total mortality estimates ranged from 124,000 to 130,000 dolphins, a far cry from the expected 41,000.

It could easily be argued that Frank's rulings were to establish and form the basis for a shift in agency attitude away from protection of the stocks to protection of the industry. The best available scientific data was overruled in order to allow industry to continue to set on dolphins. Even NOAA's ruling of an offshore spotted stock 3% higher than the lower boundary of OSP left little room for error. Industry had already shown its ability to reduce this stock by 37% in 20 years. If one accepted Frank's conservative figures, they were to be allowed to fish with a quota higher than the mortality inflicted in the last three years. Quotas apparently were to be established on the basis of what the industry was presently capable of killing, not on a mortality reduction program and then extended over five years.

SUNDOWN SETS

Final regulations prohibited the release of the net 90 minutes or less before sunset. This was an attempt to curb the far higher kill rates which occurred at night. From 1977 through 1980 sundown sets only accounted for 8.2% of the tuna catch but 27.9% of the dolphin mortality. Thus a prohibition on nights sets had the potential to reduce dolphin mortality by 30% or more.

Industry immediately protested the regulation on the grounds of "economic feasibility". Eight days after the prohibition went into effect, NMFS suspended the regulation, until an in-depth comparison of daytime versus nighttime mortality could be done. This analysis was never done as fisherman challenged NMFS statutory authority to place observers with enforcement capabilities aboard vessels (Balelo v Klutznick, 519 F.Supp 573(S.D.Cal 1981)) . If the courts should rule in the plaintiffs favor, such prohibition could not be enforced.

1981 AMENDMENTS TO THE MMPA

Several amendments specific to the ETP tuna fleet occurred in 1981. The most significant was a qualification of the immediate goal in its application to the purse seine fleet. The "immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality rate and serious injury rate rate" was retained. This

goal, however, was qualified specifically for the tuna industry with the following amendment: "...provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." (Pub.L. 97-58,2(1)(A); 16 U.S.C.1371(a)(2)) This meant that the quota could stay at 20,500 as long as the industry showed that it was an economically and technically practical one.

In addition, a significant change was made in the definition of "depleted". Prior to 1981, any of three conditions qualified a stock as depleted. These were if a stock had declined to a significant degree over a period of years, is listed under provisions of the Endangered Species Act, or is determined to be below its OSP. The first of these conditions was removed from the law in order to substitute a single management standard of maintaining animals above OSP (Pub.L.97-58,1(b)(2)(a); 16 U.S.C.1361(1)).

The Act was further amended to direct that the Secretary must "undertake a program of, and shall provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals" (Pub.L.97-58;16 U.S.C.1380(a)). Findings of these programs were to be reported annually. However, shortly after the adoption of this amendment, the gear and alternative program at NMFS was disbanded

due to lack of funding. Consequently, no new gear or alternative methods have been devised.

THE U.S. FISHERY, 1981-1984

With the adoption of a static quota, the annual decline in kill levels came to a standstill. Subsequent to the passage of the Act, estimated annual U.S. kill levels decreased from 200,000 in 1972 to 19,000 in 1978. No additional progress was made in the five year period after the quota became permanent. With the exception of the atypical year of 1983 when fishing effort in the ETP plummeted, mortality estimates ranged from 18,000 to 23,000 dolphins. Further, the second factor responsible for past kill reductions, the observer program, had come under attack by the industry.

THE OBSERVER PROGRAM 1968 - 1984

Voluntary since 1968, the observer program became mandatory as a result of Richey's ruling in 1976. Observers were to conduct research, and observe mortality and vessel operations which could later be used in civil or criminal proceedings, forfeiture actions or permit revocation. Annual mortality estimates were derived from those trips which were observed and then extrapolated to include all trips. Coverage fluctuated around the 30% level. The record clearly shows that the placement of these federal observers aboard vessels was perhaps the single

most important factor leading to real fleet wide mortality reductions. Further, Crooms (1980) reported that dolphin mortality was significantly higher on vessels not carrying observers than on vessels where observers were present. Hence many feared that estimated mortality was only a fraction of the real mortality.

In 1981, industry challenged the statutory authority of NMFS to require that vessels carry federal observers. A district court federal judge ruled that information obtained on board could not be used for enforcement or prosecution (Balelo v Klutznick, Supra). In 1982, over 23,000 dolphins were killed, exceeding the quota of 20,500. Due to the courts ruling however, the quota could not be enforced while a 3 judge panel of the Ninth Circuit Court of Appeals affirmed the decision and further ruled that the placement of observers on board vessels for any reason whatsoever was illegal (Balelo v. Klutznick, 467 U.S.1252(1984)); an "en banc" review by the entire panel reversed the decision in 1984 (Balelo v. Klutznick, 724 F2nd 753(9th Cir.1984)). The Supreme Court refused to hear a petition filed by the plaintiffs (Balelo v. Klutznick, 467 U.S.1252(1984)), and the observer program was reinstated with full enforcement powers returned.

1984 AMENDMENTS TO THE MMPA

By 1984, troubling questions on depleted status for the northern offshore spotted dolphin population were again beginning to surface.

In 1979, the SOPS workshop revealed that the major target stock could be below its OSP. The Administrator of NOAA, after a lengthy and costly ALJ hearing, reversed this finding and later a court directive led to a virtual doubling in the population estimates of all target stocks (American Tunaboat Association v. Baldrige, 738 F.2nd 1013(9th Cir 1984)). Yet Smith (1983) showed the northern offshore spotted at 35-50% and the eastern spinner at 20% of pre-exploitation levels. Further, a re-examination and augmentation of the data by NMFS in 1984 showed that perhaps the northern offshore spotted was depleted. In a letter from the Deputy Regional Director of the Southwest Fisheries Center dated Jan. 17, 1984, Gary Smith states "The depletion issue had been the single most contentious issue in past rulemakings and is expected to be the focus of the 1985 hearings unless interim action is taken.... (I)ndications are that using an existing MNPL of 60%, which some evidence suggests is too low, the major target species of the yellowfin purse seine fishery, northern offshore spotted dolphin stock, will be found depleted. Without greater flexibility to deal with depleted stocks, the U.S. tuna purse seine fishery on porpoise would be largely prohibited." Such an interim rule "would mean a closure of the fishery on porpoise... and the probability of another protracted and controversial rulemaking likely." Proposed alternatives, outlined in the letter, included that the stock must also be threatened or endangered under the Endangered Species Act to qualify for depleted status or, if not, revised to allow a take of depleted stocks.

A depleted ruling for the major target stock and a prohibition of their take would have a severe economic impact on the fishery given that no viable alternatives to the method of encircling dolphins for tuna had been investigated or developed in years.

In an attempt to avoid costly and controversial rulemaking procedures which might have resulted in a closure, 1984 became the year of "good faith" compromises. The general permit with an attached quota of 20,500 would be extended indefinitely and a quota for depleted species would be granted in the hopes that relieving industry of periodic regulatory proceedings would allow for the development of new gear and alternative methods. In exchange NMFS proposed a monitoring program designed to ensure that the continued take would not disadvantage the stocks. A statute attempting to address the rising foreign kill through market access restrictions was also adopted. Foreign countries in the purse seine fishery would be subject to tuna importation bans unless their kill levels and regulatory programs were comparable to that of the U.S. fleet.

Permit Extension

The general permit issued to the American Tunaboat Association once issued on a yearly basis, then a three year and later a five year basis, was extended indefinitely. This would alleviate the historical and costly burden to the agency and industry of formal hearings and potential ensuing litigation. Indeed, in 1980 the ATA spent over \$1 million on research and legal fees to argue that the northern offshore spotted was not depleted. Thus the

stock specific and aggregate quota of 20,500, originally established in 1980, was codified (Pub.L.98-364, 102(2); 16 U.S.C.1374(h)(2)). This introduced an inconsistency into the Act--a static non-declining quota for the tuna industry despite the "immediate goal" to reduce the mortality to numbers which approach zero. Further, the abolishment of a periodic mandatory review process effectively removed any incentive on the part of the fishery or the agency to actively seek mortality reduction. As a result, gear and alternative tuna-catching programs disappeared. Thus it is that in 1986 a fleet of 34 vessels fishing on dolphin was granted the same quota (20,550) allowed in 1981 when the fleet comprised 91 vessels.

Certain conditions were tied to the extension of the permit. Paramount to these was the ability of the Secretary to modify the quota and requirements for gear and fishing practices if based on the "best information available" (including that obtained under the monitoring program) he determines "that the present allowable take is having a significant adverse effect on a marine mammal population stock...." (Pub.L.98-364,102(2);16 U.S.C.1374(h)(3)(B)).

Monitoring Program

In recognition of the controversy that continued to surround determinations on original and present population estimates, and the relationship of these ratios to OSP, NMFS proposed a program designed to monitor annual trends in abundance or changes

in the existing populations. Congress and the conservation community were assured that quotas could and would be adjusted if the level of take was shown to reduce the stocks. Mandated to commence on January 1, 1985 (Pub.L.98-364,102(2), 16 U.S.C.1374 (h)(3)(A)) and to continue for at least five consecutive years, the surveys did not begin until mid-1986. Funding was slow in coming as NMFS expressed concern that the ability to detect changes, and thus ensure that the present quota was not to the disadvantage of those populations and stocks may not be as realistic as first thought. Gerrodette (in press) in his work at the Southwest Fisheries Center, Honolulu Lab shows that in order to detect that a change has occurred within 95% confidence level, the population would have to suffer a 9% decline per annual census. Thus, during the established five year monitoring program, the population or stock would have to decline by 45% in order for there to be a detectable change.

Depleted Stocks

Even if the monitoring program were to detect serious problems in populations, an action was taken which could preclude remedial actions. Just as the overall quota was effectively frozen in place, a quota of 250 coastal spotted dolphins and 2,750 eastern spinner dolphins was written into the law (Pub.L.98-364,102(2), 16 U.S.C.1374(h)(2)(B)(iii). Both species are designated as depleted, but the takes are applied against the overall quota of 20,500. This is a far cry from the original intent of the law when concern over the status of dolphin stocks was, in part, responsible for a prohibition on the taking of depleted stocks

and a requirement that steps be taken to replenish stocks below OSP.

Rather than requiring a scientific standard, the exemption for specific species and a specific industry was granted. Ironically, the exemption rewards the same industry which was responsible for the depleted status of the two stocks. The tuna industry is the only fishery which is permitted to take depleted species during commercial operations.

Imports

In an attempt to curb the ever growing mortality inflicted by the foreign fleet, Congress strengthened the Act in 1984 to prohibit the importation of tuna from nations whose kill rates and regulatory program were not comparable to those of the U.S. fleet. "[T]he Secretary...in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that (i) the government of the harvesting nations has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and (ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such

harvesting." (Pub.L.98-364, 16 U.S.C. 1371(a)(2)(B)(G)).

Before the passage of this amendment, importation provisions were addressed by 1978 regulations drawn up under the much weaker and more general import prohibitions section of the law. Importation was contingent upon findings by the Asst. Administrator for NOAA, that the fishing operations of the exporting nation "...are conducted in conformance with U.S. regulations and standards" or "... (do) not result in an incidental mortality or serious injury in excess of what results from U.S. fishing operations." (50 CFR 216.249(e)(5)). In practice, the administration of this provision has become a rubber stamp procedure. Every nation requesting a finding of conformance has received such a designation. Nations which have been embargoed under the MMPA either did not request a finding or were already embargoed under the Magnuson Fishery Conservation and Management Act in retaliation for vessel seizure. Such embargoed nations have included Peru, Ecuador, Mexico, and Costa Rica under the MFCMA and the USSR, Congo, Senegal, and El Salvador for failure to report. Spain was embargoed under the Tuna Conservation Act.

By passing the amendment in 1984, the Congress clearly signaled that it was not satisfied with the manner in which NMFS had applied the provisions of the law. Despite this clear congressional mandate, NMFS did not propose regulations to implement the statute for another two years. And those regulations, proposed on August 13, 1986, would not have corrected the problem. They would have allowed exporting nations

kill rates of up to 50% higher than those of the U.S. fleet. It was conceded by NMFS that the proposed regulations would only perpetuate the current kill levels rather than force nations to effectively control and reduce mortality. New regulations were proposed in May of 1987. "The modifications are designed to demonstrate firmness in U.S. efforts to achieve comparability in reducing marine mammal mortality between U.S. and foreign fleets without precluding foreign cooperation in saving marine mammals by issuing criteria so stringent that foreign nations cannot qualify for a finding". The agency feared that strict regulations would cause foreign nations to seek markets outside of the U.S. where no controls exist (much like regulations in late 70's caused U.S. vessels to reflag). While the new proposal greatly increased requirements towards a more comparable regulatory program, the modifications would have also allowed for kill rates up to 400% higher than U.S. kill rates. It is difficult to believe that Congress intended this definition for the word "comparable" when earlier regulations, found lacking by Congress, called for operations which did not result in mortality "in excess of that which results from U.S. fishing operations". On March 22, 1988, NMFS issued interim final regulations, open to comment for 60 days. A preliminary review indicates they are woefully inadequate to meet the task set out in 1984. Indeed, comparability as defined by NMFS will not be achieved until 1991.

Meanwhile, U.S. importation of tuna from other ETP fishing

nations has grown considerably. In 1984, 9,222 short tons of foreign caught ETP yellowfin was imported into the U.S. and accounted for 22% of all yellowfin imported. In 1986, that figure jumped to 46,945. (Environmental Assessment, 1987). Furthermore, in 1986, Thailand exported 152.3 million pounds to the U.S. While Thailand does not fish the ETP, it receives tuna for canning from other ETP fishing nations.

REGULATIONS REDUCED TO GUIDELINES

The 1984 reauthorization amendments also allowed the Secretary to "make such adjustments as may be appropriate to those terms and conditions that pertain to fishing gear and fishing practice requirements.." (Pub.L.98-364,102(2), 16 U.S.C.,1374(h)(2)(B)). Thus, in 1985, NMFS proposed to reduce many of the regulations developed and implemented over the years to non-enforceable guidelines. "The NMFS believes it would be better to allow some flexibility for vessel operators to use porpoise saving gear effectively and efficiently, recognizing that the skill of skipper and crew is more critical than many of the detailed regulations." (DEIS 1985 p.23). The success of deregulation was to be measured in kill rates while the overall quota would act as a stopgap measure if the program failed. Amended regulations which went into effect January 1, 1986. These included the deletion of the requirement for skipper logbooks; deletion of specific bunchline locations; deletion of the requirement for super apron installation; deletion of the prohibition on sundown

sets with the requirement that high intensity lights be installed, reduction in required gear inspections, allowance of the substitution of speedboats (previously with required locations to prevent net collapse and canopies) for rubber raft and allow for uncertificated vessels to receive waivers in order to carry more than two speed boats when transiting the ETP.* The backdown procedure and the use of either the Medina panel or the super apron was retained. Interestingly, these two methods were developed and utilized by the fishery prior to the passage of the Act.

The effect of allowing a competitive industry to again police itself is evidenced by the fleets performance in 1986, the first year with the weakened regulations. The overall quota was exceeded nine months into the 12 month season, and kill rates rivaled those of a decade ago. A fleet which once apparently demonstrated its ability to stay within the quota with over 100 vessels, exceeded the same quota before the end of the year with only 34 vessels fishing. It has been suggested that the recent amendments to the MMPA, closely followed by a reduction in guidelines, resulted in an overall and general complacency on the part of the fleet.

* It has been argued that at least three speedboats are necessary to successfully chase and herd the dolphins. Purse seiners not covered under the General Permit may not set on dolphin and as an enforcement measure, were not allowed to carry more than two speedboats. It is widely suspected that vessels without certificates of inclusion pick up additional speedboats once out of port. This waiver for additional speedboats, granted on a promise by the operators that they would not fish in the ETP, further removed NMFS control over unobserved/unassessed mortality.

1986 CLOSURE

NMFS issues semi-monthly dolphin mortality estimates based upon observer reports. From these reports it was clear very early in the year that mortality for 1986 was running extremely high, and if the trends continued the quota would be exceeded well before the year's end. Only six months into the year 17,729 dolphins, or 86 percent of the quota, had been killed. The fishery had exceeded the quota twice before--in 1976, the first year of annual quotas and again in 1982 when a court decision prevented observers from being used as enforcement agents. While measures ensuring that the quota would not be exceeded were necessary, NMFS was unsure what could legally be done in order to enforce quota compliance. First, they proposed the surrendering of all certificates of inclusion coupled with the imposition of a two speed boat limit. Such an action would have also resulted in all observers being removed from the vessels. Because other methods could be used to land yellowfin, NMFS felt that a total closure would be legally questionable. Clearly the first alternative would not ensure compliance and the second would be likely to generate litigation. The interim rule issued Sept. 16, 1987, prohibited U.S. flag vessels from catching, possessing or landing yellowfin tuna unless the vessel voluntarily carried a NMFS observer to verify that the tuna was caught in compliance with the prohibition on dolphin sets. Yellowfin could not be imported after the dolphin closure unless a government observer from the exporting nation verified that the yellowfin was not taken on

dolphin. The closure on dolphin sets went into effect on October 13. Vessels continued to fish the remainder of the year without killing dolphins. Despite dire predictions, the amount of tuna landed after the prohibition on dolphin sets was equivalent to previous years.

PERFORMANCE STANDARDS

"Several industry representatives asserted that the quota was reached because a small number of vessels in the fleet had exceptionally high kill rates because the operators of those vessels either lacked the skill or motivation to maintain a low marine mortality while fishing." (NMFS Draft Porpoise Mortality Performance Standards, Dec 12, 1986)

In December, 1986, NMFS proposed to issue performance standards for skippers and vessels to be utilized to identify problems to be corrected. If necessary, poor performers would be removed from the fleet. In anticipation of the performance standards and at the urging of both the environmental community and the industry, 1987 began with 100 percent observer coverage. After the industry expressed opposition, the observers remained onboard but the performance standards were abandoned. Total coverage in 1987 may have had some effect, however, in awakening the unmotivated and complacent as to the seriousness of their actions. U.S. fleet mortality for 1987 dropped to 13,992, the lowest kill since 1983 when fishing effort within the ETP had been reduced by the El Nino phenomenon. None the less, the quota on the depleted eastern spinner of 2,750 was nearly reached. The fishery came

within 64 animals of yet another limited closure.

INDUSTRY PERFORMANCE

While the fishery has on a number of occasions been praised for its achievements in reducing mortality, a closer analysis of the record indicates that since 1978 there has been no improvement in performance. After the passage of the Act in 1972, mortality levels dropped. The most substantial decrease occurred between 1976 and 1977 when mortalities were reduced from 108,000 animals to 25,000 in 1977 after the imposition of quotas and observers. There was a further reduction to 19,366 animals in 1978. Then reduction in mortality stopped. From 1978 to 1986 the U.S. fleet has continued to kill an average of over 19,000 dolphins annually. From 1978-1980 the annual kill averaged 18,625. From 1981 to 1983 the annual average kill was 17,125 (this includes the atypical year in which less than 10,000 dolphins were killed due to low fishing effort in the ETP). From 1984-1986 the annual average mortality level increased to 19,211. This occurred despite a 70 percent reduction in the U.S. fleet size, from over 100 vessels in 1980 to between 34-36 after 1983.

Year	# of Certified vessels*	Annual Kill	Kill per Vessel
1980	107	18,573	173
1981	93	18,520	199
1982	89	23,267	261
1983	60	9,589	159
1984	34	17,732	521
1985	36	19,205	533
1986	34	20,692	608

* Porpoise Rescue Foundation 01/09/87

From 1981 to 1986 the annual kill per vessel setting on dolphin tripled. When one corrects for actual fleet days, i.e. the total number of days all vessels spent fishing, and thus incorporate real time effort of the fleet, kill per fleet day fishing increased by a factor of four.

Year	Fleet days*	Average kill per fleet Day
1981	19057	.97
1982	17559	1.32
1983	10263	.93
1984	6191	2.86
1985	6459	2.94
1986	4886	4.24

*Porpoise Rescue Foundation 1/9/87

Of additional concern are the number of dolphin sets as a percentage of all sets. Historically, dolphin sets have accounted for 30-50 percent of all sets made. In 1981, 47 percent of the ETP sets were on dolphin. The percentage of reliance on dolphin sets has steadily increased to 94% in 1986. However, even when the increased effort on dolphin is considered, performance (mortality) as measured by fleet effort on dolphin has still increased by a factor of two.

The number of dolphins killed per set involving dolphins (kill/set) has also risen in the past few years from 3.2 in 1981 (NMFS FEIS 1985) to 4.7 in 1985 and 6.8 in 1986 (PRF 1987). The number of dolphins killed per ton of yellowfin taken during dolphin sets (kill/ton) has diminished from .32 dolphins per ton

of yellowfin in 1981 to a rate of .27 in 1986. However, it is important to consider that the denominator (i.e., tons of tuna taken per dolphin set) jumped over the same period from an average of 11 tons per dolphin set to 25 tons, thus artificially reducing the ratio. Use of the kill per ton ratio measures fishing efficiency and not effectiveness in reducing dolphin deaths.

While kill rates, whether per ton, set, vessel or days of fishing effort, provide a yardstick to measure industry's historical performance, these rates are of little importance. Kill per ton levels may actually decrease substantially while the total number of dolphins killed increases. Of import to the dolphins and their respective stocks is the level and subsequent impact of the kill, not the rate at which it is accomplished.

MORTALITY ESTIMATES

Early mortality estimates differ from researcher to researcher because, for over a decade, there was no systematic effort to record data. Even the more recent annual mortality estimates are dubious. Mexico, the largest component of the fleet, agreed in 1986 to carry observers for the first time. IATTC estimates of total ETP fleet kill jumped from 55,000 dolphins in 1985 to 124,000 to 130,000 in 1986. Was 1986 an extremely aberrant year or has the total fleet kill been consistently underestimated by a factor of three?

In order to determine the impact of a take on a given population

or stock, accurate assessments of past and present lethal take levels are necessary. The annual level of lethal take is determined through mortality estimates which are derived from observed trips (by NMFS and IATTC) and extrapolated to include all trips. However, the relation of mortality estimates to actual take levels is highly questionable. Fleet observer coverage for both the U.S. and foreign fleet fluctuates greatly from year to year. Inherent in the calculations is the 'no observer effect', i.e., it is assumed that an unobserved vessel performs in a manner comparable to an observed vessel. There is no evidence to support this assumption, and the evidence which does exist indicates that trips without observers inflict higher takes than are recorded (Crooms 1980). U.S. observers are federal agents with restored enforcement powers capable of utilizing regulatory and procedural infractions for prosecution. Furthermore, an operator may think twice before setting in poor conditions which might result in a disaster set that would be applied against the overall U.S. quota. Ironically, in 1986 NMFS eliminated the skipper logbooks (where unobserved mortality is recorded) because their veracity was doubted. Despite this, the agency assumes observed and unobserved vessels perform alike.

Unlike the NMFS mandatory observer program, the IATTC technician program is voluntary, and observers have no enforcement powers. Information gathered on specific vessel operation or national kill levels is confidential. As technician data can not be used against an operator, owner, or nation, one might more readily

presume that a 'no observer effect' exists. LaBudde (pers. comm) recently reported that a crew member from a foreign vessel jumped into the water "almost from instinct" to free animals only to remember no observer was present and climbed back aboard. His last trip had carried an IATTC technician.

Strange anomalies appear in NMFS' own data which lead to questions as to whether NMFS estimates are reliable indices of actual kill levels. In 1986, a formal request was made by Greenpeace to initiate a closure on dolphin encirclement as the quota limit was being rapidly approached. Six months into the fishing season the U.S. fleet had killed over 16,000 dolphins and the kill rate indicated quota could be reached as early as June 17. NMFS stepped up observer coverage and began to issue weekly mortality estimates. On June 29, their estimate of cumulative dolphin deaths for the year was 17,729. Three weeks later on July 20, only 16,438 dolphins had died. The phenomenon of the resurrection of the dolphins had the convenient result of forestalling the closure for four months.

The intentional take of marine mammals by the tuna fishery is not a random event as may be the case with other fisheries. The operator is in control of where, when, how, and on which species a set is made. Therefore, observer coverage or sample size at less than 100 percent cannot ensure reliable mortality statistics.

While seriously injured or mortally wounded dolphins are to be

included in mortality estimates, there are no provisions for "cryptic" kills, animals which may not show outward signs of injury but die from exhaustion or stress. "Potentially porpoise may die due to stress of chase and capture. The large number of animals involved in the fishery means that a considerable number of porpoise might be killed , even if capture stress affects only a small percentage of the animals chased and captured. For instance, 6.5 million porpoise were estimated to have been captured in 1977 compared to an estimated total population of 6.4 million." (SOPS 1979 p.33).

Myrick (1987) showed that dolphins chased for 45 minutes and then held in a purse seine net had substantially depressed serum calcium levels ranging from 8.6 to 7.3 mg/dl., indicating the animals had been seriously stressed. Normal levels range between 9 and 12 mg/dl. In many mammals parathyroid tetany occurs (which can result in regional paralysis or cardiac arrest) if levels fall below 7.

Industry has long used the percentage of dolphins released to dolphins captured as the rate to demonstrate their increased dolphin rescue efficiency. (This rate too has worsened from 99.23 in 1984 to 98.98 in 1986). If industry is correct in stating that 98.98% of the dolphins captured in 1986 were released, then over 2 million dolphins were encircled and an even greater number chased and hounded by the U.S. fleet alone. When partial herds are captured, often code groups (vessels working as cooperative units) relay the location of escaped or released

dolphins to the idle vessels (Sam LaBudde, pers. comm).

Thus it is possible that a particular herd may be chased and encircled more than once in a given day. What are the effects of the chase and encirclement on the dolphins social structure, their feeding behavior, or on pregnant and nursing females and calves and fetuses?

THE DOLPHINS

Twelve species of dolphin, comprised of 22 separate stocks are involved in the ETP yellowfin fishery. These species all belong to the Family Delphinidae (dolphin), and contrary to popular belief (or a wrongly used vernacular) no porpoise are taken in the fishery. It is widely rumored throughout the fleet that whales are also set upon occasionally. In 1984, a foreign tuna purse seiner operating with a U.S. skipper was caught and fined for setting on and killing a sei whale. In 1985, a U.S. tuna vessel, while operating in the Atlantic, was observed encircling three humpback whales but was not prosecuted. In early 1988, a Panamanian vessel attempted to set on a pod of whales, but the whales sounded before the skiff was released. (Pers. comm Sam LaBudde).

The three species most involved in the eastern tropical Pacific tuna fishery are the spotted dolphin, spinner dolphin, and common dolphin. In addition, several other species including the striped and bottlenose dolphins are occasionally taken. The

major dolphin species range widely throughout the ETP, often traveling in herds of 100 and more. Each of these species are comprised of a number of geographically and morphologically different subspecies known as stocks.

Offshore Spotted Dolphins

Stennella attenuata is comprised of the northern offshore spotted stock, the southern offshore spotted stock and the coastal spotted stock. The latter two stocks were not thought to have been heavily exploited, if at all, until the early 1970's. The northern offshore spotted, however, has been heavily exploited since 1959 and continues to represent the majority of the annual estimated mortality. Sets on pure and mixed herds of offshore spotted dolphins account for over ninety percent of all tuna taken in association with dolphin. (DEIS 1980) Thus these stocks have suffered the greatest mortality.

Northern Offshore Spotted Dolphins

It has been estimated that 4.43 million northern spotted dolphins died during the first twenty years of the fishery. (Goodman, 1979). Reported to be below its OSP, first in 1979 by the SOPS Workshop, again in 1983 (Smith), and yet again in 1984 (Testimony of Asst. Admin. of NOAA before the House Merchant Marine and Fisheries Comm. 3/15/84) Admin. of NOAA) the IATTC has documented a continuing annual decline. From 1977 to 1986, the northern offshore spotted population dropped from 4.34 million to 3.34 million or 23% in only ten years. (IATTC 1986).

The Commission has stated, "There is strong evidence of a decline in the northern offshore spotted stock of spotted dolphins from 4 to 5 million animals in the mid-to late 1970's to around 3 million animals in the early 1980's....There were relatively few sets on spotted dolphins during 1983-1984, and there is some evidence of higher population levels in 1985-1986, although the increase from 1984 to 1985 is not statistically significant." (IATTC, 1986).

In 1986 alone, an estimated 67,245 offshore spotted dolphins were killed (IATTC 1986), although as far back as 1980 the maximum replacement yield of northern offshore spotted dolphins was estimated at 85,335 and the southern stock at 11,395 (45 Fed.Reg.213,Table 2). While the IATTC does not apportion offshore spotted mortality between the northern and southern stock, the current level of take represents a significant percentage of the two stocks combined replacement yields.

In its 1986 annual report, the IATTC noted that a higher proportion of pre-adult stages of the offshore spotted dolphins were being killed. The Commission further states, "...a large proportion of pre-adults in the population is an indication of above-average recruitment in recent years and may be considered a positive sign" (IATTC, 1986). However, a reduced proportion of adults taken could also indicate that the animals are not reaching maturity. Further, one must consider the ramifications to a population when over 60% of the animals taken have not reached recruitment stage.

Southern Offshore Stock

The southern stock of offshore spotted dolphin has experienced a rapid decline in the last ten years. Not considered a target stock until 1973, it was estimated by SOPS in 1979 to be at 92-98% of its pre-exploited level. However, the IATTC shows that the southern stock has declined in the last ten years from a population in 1977 of 1.63 million animals to .290 million animals--a reduction of over 80%.

Coastal Spotted

In 1980, this stock was declared depleted and its take prohibited by U.S. vessels. NOAA believed the SOP'S had erred in apportioning the historical kill of northern offshore spotted by not accounting for the offshore movement of the fleet. "The effect of this is that 670,000 coastal spotted were caught in the early years of the fishery" (45 Fed Reg, 72184). A quota of 250 coastal spotted has been granted to the U.S. fleet, but as this stock dwells primarily in waters off limits to U.S. vessels it is not a target stock of the U.S. fleet. No such provisions exist on the foreign fleet and stock specific annual takes or population estimates are not available.

Spinner Dolphins

The spinner dolphin is second in importance to the fishery and comprises 4 different stocks, the Costa Rican, eastern, and northern and southern whitebelly spinners.

The Costa Rican spinner is found coastally in Central American waters, where U.S. vessels risk seizure, and is not thought to be exploited by the U.S. fleet. Very little is thus known about their population levels although it is considered to be relatively small, and its take is prohibited. Foreign vessels fishing the coast are known to exploit this stock. (Pers. comm. Sam LaBudde 1988).

Eastern Spinner

The eastern spinner dolphin was second in importance to the U.S. fleet until it was declared depleted in 1976. Considered to have been reduced by 80% or more by 1979, this stock has suffered the greatest impact as a result of tuna fishing operations. Eastern spinners are often found in mixed herds with spotted dolphins or with other spinner stocks. Identification can be difficult even to the trained observer. Often, easterns are classified as whitebellies and the data reworked as easterns are prorated in the final mortality estimates (Pers. comm, IATTC). While a prohibition on encircling pure spinner herds exists, taking eastern spinners is allowed under a quota. This is permitted only if easterns are not thought to be part of a mixed herd before the skiff is released. No such regulations apply to the foreign vessels. In 1986 and 1987 the U.S. fleet came dangerously close (within 64 animals in 1987) of exceeding the eastern spinner quota. In 1986 alone an estimated 15,594 were killed by the ETP fleet as over 20% of the sets involved eastern spinners. (IATTC 1986).

Whitebelly Spinners

Both the northern and southern whitebelly spinner stocks were not involved in the fishery until 1969 and 1973 respectively (SOPS 1979). Like the eastern spinner these stocks are also known to herd with offshore spotted dolphins. Both stocks were considered above OSP by SOPS in 1979; however, reservations were expressed with respect to the northern stock.

Common Dolphins

The common dolphin comprises three stocks, the northern, central and southern tropical. Very little is known about these stocks as they were once thought to be of lesser importance to the fishery. However in 1986, IATTC estimated that 25-26,000 common dolphins were killed. As the U.S. fleet reported kills of an estimated 323 common dolphins, the foreign fleet was responsible for the balance. In 1979, SOPS estimated the replacement yield of all three stocks combined to be between 0 and 5,321.

STATUS OF STOCKS

The lower boundary of OSP has been ruled to be 60% of the original or pre-exploited population or stock. Therefore, both past and present population estimates are necessary, along with historic kill levels, present kill levels and net recruitment rates. Different interpretations and estimates have resulted in widely variable assessments of the status of target stocks:

STATUS OF TARGET STOCKS
NORTHERN OFFSHORE SPOTTED

	original pop.	(in millions) 1979 pop.est	1979 status	1986
SOP'S 1979	5.0-7.0	2.33-2.76	34-55%	
NOAA 1980	5.0	3.15	63%	
NMFS/COURT 1980	7.19	6.12	85%	
Smith 1983	4.8-5.6	2.78-1.68	35-50%	
IATTC 1986	NA	3.59	NA	3.34

EASTERN SPINNER
(in millions)

	original pop	1979	1979 STATUS	1986
SOPS (1979)	1.42-1.86	.298-.305	16-20%	
NOAA 1980	1.55	.418	27%	
NMFS/COURT 1980	1.67	.918	55%	
Smith 1983	1.5	.293	20%	
IATTC 1986	NA	.460	NA	.600

Clearly such data indicate that a high degree of uncertainty continues to exist with respect to the status of the stocks and the impact of the fishery on the populations. The estimates produced by NOAA after the 1980 court directive stand out because of their inconsistency with the other figures. These are the estimates that the agency is utilizing today.

TRENDS IN ABUNDANCE

In an effort to dispel the contentious nature of the status of stocks, NMFS proposed to monitor annual trends in abundance to

determine if, after five years, the continued level of take was to the disadvantage of the stocks. Congress mandated such a study during the 1984 reauthorization of the Act. The fishery by some estimates had already severely reduced many of the target populations to below or just within OSP levels, yet the 1985 census would constitute the baseline year. As the monitoring program did not get under way until 1986, 1987 surveys would be the first indication of any trends.

Confounding matters more, it has been reported that trends in abundance are very difficult to detect with any level of confidence unless the changes are of severe magnitude. In order to detect a change with a 95% confidence interval, the population would have to experience a 45% increase or decrease over a five year period (Gerrodette, in press). A six year survey with a confidence interval of 90% would require a 40% change in abundance for detection to occur. Thus, either the confidence level is lowered, the period of assessment is lengthened, or the percentage of change in a population is greater in order to detect trends.

Such a study also requires a reasonable sample size (i.e., encounter rate) in order to give a modicum of precision. If the far afield population estimates mandated by the 1980 court directive are discarded, the monitoring program is contending with already severely reduced populations. Indeed, encounter rates for offshore spotted dolphins have been reported lower than expected. (NMFS pers. comm) This lower sample size will effect

the results by either lowering further the confidence level, or increasing the length of time or magnitude of change necessary to detect a trend. Given the above, the monitoring program cannot ensure that present takes are not to the disadvantage of the stocks.

THE INTERNATIONAL FLEET

The Inter-American Tropical Tuna Commission operates under the authority of a Convention originally entered into by the United States and Costa Rica. Established in 1950, later participating nations included Panama (1953), Ecuador (1961), Mexico (1964), Canada (1968), Japan (1970) and France and Nicaragua (1973). The principal duties of the Commission are to research and recommend harvest levels of tuna from the eastern tropical Pacific which will allow for maximum sustained catches. As yellowfin tuna comprises the majority of tuna taken and has time and again demonstrated the need for conservation measures, it is the yellowfin species which the Commission emphasizes.

As early as 1961 the IATTC expressed concern over the yellowfin stocks of the ETP. So efficient had the purse seiners become that the Commission had to revise its methodology of catch per unit effort or risk artificially high yellowfin abundance estimates. Disagreement among the member nations delayed implementation of a yellowfin management scheme and voluntary quotas were established on a first-come basis within the the Commission Yellowfin Regulatory Area (CYRA). When quotas were reached vessels had only to move outside, or west, of CYRA to

fish on a separate yellowfin stock. By the late 60's vessels were capable of sufficient range that closures did not appear to affect the industry. As vessels fished west of CYRA and east of 150 W the percentage of sets made on dolphins more than doubled and comprised 95 percent of the total sets.

After the management scheme had been agreed upon by member nations in 1966, and up until 1979, the IATTC was successful in controlling harvest and conserving the yellowfin stocks. As demand for yellowfin tuna grew, less developed nations, whose boundaries border CYRA, argued their sovereign right to exploit and manage tuna found in their waters. A first-come first-served rule was not in their best interest as the larger U.S. vessels were better equipped to rapidly harvest large amounts. The U.S. and the convention under which the IATTC operates do not recognize sovereign rights over tuna, citing the highly migratory nature of yellowfin. Under pressure from Chile and Peru, Ecuador withdrew from the Commission in 1968. Mexico, second only to the U.S. in fleet size, withdrew in 1978, and Costa Rica withdrew in 1979. This marked the end of an effective management scheme. Vessel seizures and retaliatory embargoes resulted as the debate over sovereignty raged. Since 1980, the Commission has continued to recommend quotas, although these quotas are not implemented by the few remaining member nations.

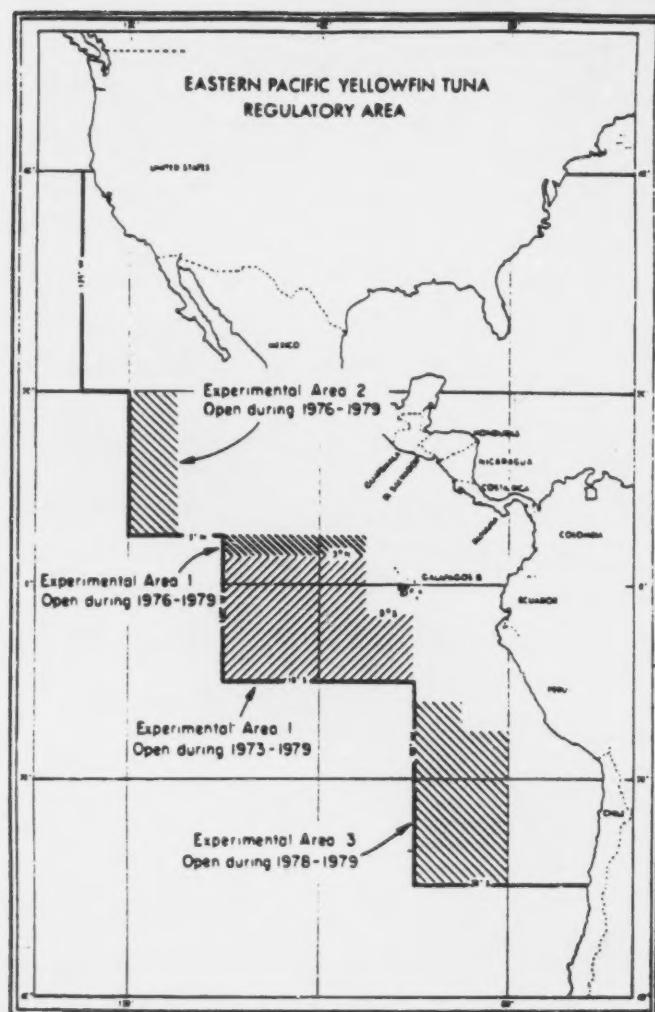
As the nations continued to argue over whether and how yellowfin should be managed, the CYRA stock again showed classic signs of overfishing. Harvests were yielding smaller age class fish, and

the catch per standard day fishing (CPSDF) in 1982 fell to 1/4 that of 1972. Fortunately for the stock, El Nino conditions prevailed in the ETP from late 1982 to early 1984. During an El Nino the thermocline is deepened and yellowfin become unavailable to the surface fishery. An exodus of vessels from the ETP to the Western Pacific began with 29 vessels leaving in 1982 and 62 leaving in 1983. The subsequent decreased fishing pressure allowed yellowfin stocks a respite and chance to rebound.

Vessels returning to the ETP in 1985 experienced the largest catch of yellowfin (240,000 short tons) since 1976. In 1986 the yellowfin catch of 296,000 tons was the highest ever recorded. Both the 1985 and 1986 catches exceeded the IATTC recommended quotas for CYRA. Preliminary 1987 results show somewhat lower yet comparable catch rate.

Realizing the importance of dolphin stocks in maintaining a viable fishery, the IATTC expanded its duties in 1976 to address the tuna/dolphin association. It would monitor the impact of the fishery on dolphin stocks with an eye toward reducing mortality through alternative methods and education. While the Commission will not assume a regulatory or enforcement position on the exploitation of dolphins by the tuna industry, the Commission has assumed the task of monitoring the international fleet's kill levels and dolphin stock abundance levels, and instructing non-U.S. nations on mortality reducing gear, techniques and U.S. laws applicable for market access.

The Commission began a voluntary observer program in 1979 and placed technicians on vessels of cooperative nations to ascertain fleet-wide mortality. Coverage on foreign vessels was as low as 2% during the initial phase of the program. Mexico refused to cooperate until 1986 when it was suggested that the U.S. tuna embargo might be lifted. Presently about 30% of the international fleet carries observers.



Environmental Assessment on the Modification to the Marine Mammal Regulations Regarding the Importation of Yellowfin Tuna Caught with Purse Seines in the Eastern Tropical Pacific Ocean, National Marine Fisheries Service, November 1987

TABLE 1

ANNUAL MORTALITY FOR U.S. AND NON-U.S. FLEETS

YEAR	U.S. KILL	U.S. QUOTA	FOREIGN KILL	TOTAL
1959				55,000
1960				478,000
1961				534,000
1962				216,000
1963				240,000
1964				390,000
1965				460,000
1966				374,000
1967				257,000
1968				229,000
1969				461,000
1970				467,000
1971	246,213		15,719	261,932
1972	368,600		55,078	423,678
1973	206,697		58,276	264,973
1974	147,437		27,245	174,682
1975	166,645		27,812	194,457
1976	108,740	(78,000)	19,482	128,222
1977	25,452	(62,429)	25,901	51,353
1978	19,366	(51,945)	11,147	30,513
1979	17,938	(41,610)	6,837	24,775
1980	18,573	(31,150)	30,978	49,551
1981	18,520	(20,500)	16,516	35,036
1982	23,267	(20,500)	5,516	28,783
1983	9,589	(20,500)	[17,759]	[27,348]
1984	17,732	(20,500)	[26,252]	43,984
1985	19,205	(20,500)	[37,505]	56,710
1986	20,692	(20,500)	[108,767]	129,459
1987	13,992	(20,500)	NA	NA

TOTAL

6,059,108

1959 to 1970 N. Lo and Smith, 1986; 1971 to 1979 NMFS, FEIS, Nov 1980; 1980 to 1981 IATTC Annual Report 1982; 1982 IATTC Annual Report 1983; 1983 to 1986 for U.S. fleet Annual Report of the MMC, 1986. Total kill figures for 1984-1986, IATTC Annual Report 1984, 1985, 1986.

Numbers in { } were arrived at by subtracting U.S. estimates from IATTC total fleet estimates.

Numbers in [] are rough approximations, arrived at from extrapolation of IATTC Annual Report data for kill average from 1979 to 1983, and should not be used.

TABLE 2

LIST OF MAJOR AND MINOR SPECIES/STOCKS OF SMALL CETACEANS IN THE
EASTERN TROPICAL PACIFIC PURSE SEINE FISHERY

MAJOR SPECIES/STOCKS

- Spotted dolphin (*Stenella attenuata*)
 coastal
 northern offshore
 southern offshore
- Spinner dolphin (*Stenella longirostris*)
 eastern
 Costa Rican
 northern whitebelly
 southern whitebelly
- Common dolphin (*Delphinus delphis*)
 northern tropical
 central tropical
 southern tropical
- Striped dolphin (*Stenella coeruleoalba*)
 northern tropical
 central tropical
 southern tropical

MINOR SPECIES/STOCKS

- Rough-toothed dolphin (*Steno bredanensis*)
- Bottlenose dolphin (*Tursiops truncatus*)
- Risso's dolphin (*Grampus griseus*)
- Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)
- Fraser's dolphin (*Lagenodelphis hosei*)
- Melon-headed whale (*Peponocephala electra*)
- Pygmy killer whale (*Feresa attenuata*)
- Short-finned pilot whale (*Globicephala macrorhynchus*)
- False killer whale (*Pseudorca crassidens*)

Source: Status of Porpoise Stocks Workshop, Southwest Fisheries
Center, Admin Report No. LJ-79-41, Nov 1979.

TABLE 3

U.S. PERFORMANCE
AVERAGE ANNUAL KILL PER VESSEL

YEAR	NUMBER OF CERTIFIED VESSELS *	ESTIMATED ANNUAL KILL	ANNUAL KILL PER VESSEL
1981	93	18,520	199
1982	89	23,267	261
1983	60	9,589	159
1984	34	17,732	521
1985	36	19,205	533
1986	34	20,692	608

* Porpoise Rescue Foundation 01/09/87

TABLE 4

U.S. PERFORMANCE
KILL PER TON OF CAPACITY *

YEAR	ESTIMATED ANNUAL MORTALITY	FLEET CAPACITY	DOLPHIN KILL PER TON OF CAPACITY
1977	25,452	116,217	.219
1978	19,366	111,054	.174
1979	17,938	110,919	.162
1980	18,573	105,022	.177
1981	18,520	107,272	.173
1982	23,267	104,120	.223
1983	9,589	77,532	.124
1984	17,732	46,458	.382
1985	19,205	45,113	.426
1986	20,692	41,550	.498

* Calculations from NMFS data

TABLE 5

U.S. PERFORMANCE
AVERAGE ANNUAL KILL PER FLEET DAY FISHING

YEAR	FLEET DAYS *	AVERAGE KILL PER FLEET DAY
1981	19,057	.97
1982	17,559	1.32
1983	10,263	.93
1984	6,191	2.86
1985	6,459	2.94
1986	4,886	4.24

* Porpoise Rescue Foundation 01/09/87

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CLAUDE
Countess of Kinnoull

TESTIMONY ON THE PERMIT PROCEDURES OF THE MARINE MAMMAL PROTECTION ACT

for the
Subcommittee on Fisheries and Wildlife Conservation
and the Environment
of the House Merchant Marine Committee

prepared by

Nancy D. Hicks, Animal Protection Institute of America

on behalf of

American Cetacean Society
American Humane Association
Animal Protection Institute of America
Center for Environmental Education
Committee for Humane Legislation
Fund for Animals
Greenpeace U.S.A.
Humane Society of the United States
International Wildlife Coalition
The Oceanic Society
Whale Center

presented by

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May 10, 1988

The above organizations appreciate this opportunity to comment on the Marine Mammal Protection Act Reauthorization on behalf of our more than two million members and constituents nationwide.

Though the Marine Mammal Protection Act (MMPA) prohibits the taking and importation of marine mammals and marine mammal products, special exemptions are allowed for either scientific research or public display, if a series of criteria are met. An exception is also made for the incidental taking of marine mammals in fishing operations, which also requires a permit.

Unfortunately, as currently administered, the Act no longer provides inhibitions to questionable practices except for the burden of properly completing the paperwork required. The permit review process has become so automatic and routine that only when there is a truly outrageous permit application or when there is a threat of litigation will an application be rejected. Of 295 research applications received as of March 31, 1986, which were sufficiently serious to be forwarded to the Marine Mammal Commission, only two were denied. Admittedly, many of the applications dealt with non-lethal methods of research or with animals who died when stranded, but the killing of 27,363 animals was approved. The figure does not include animals killed abroad from which tissues were later imported. In the case of display permits, of 261 applications forwarded to the Marine Mammal Commission, only 8 have been denied. Many were approved in spite

of serious deficiencies.

SCIENTIFIC PERMITS

Congress wrote detailed statutory language relating to the permitting process, rather than merely leaving the promulgation of regulations to the discretion of the Secretary. We are very concerned that the National Marine Fisheries Services (NMFS) has at times ignored these requirements when granting scientific permits. Under Section 104 (b) of the Act, a minimal set of criteria are laid out. The application must specify, "(A) the number and kind of animals which are authorized to be taken or imported, [and] (B) the location and manner (which manner must be determined to be humane) in which they may be taken, or from which they may imported..." Yet, two permits were issued in the last year and a half which requested "all cetacean species" and "all pinniped species" anywhere in the world. Not knowing what they might receive under such an all-encompassing permit, the applicants could not possibly describe the research that they intended to perform.

In the permitting process, little or no attention is paid to the underlying necessity for the research in question. While many interesting things could be learned about marine mammals, it is imperative to apply much more stringent criteria in the case of protected species, relating to the usefulness of such research and the value for the protected species itself. This is particularly relevant in the case of lethal research. Indeed, NMFS's own

regulations state that:

In determining whether to issue a scientific research permit, the Secretary shall, among other criteria, consider whether the proposed taking or importation will be consistent with the policies and purposes of the Act; and whether the granting of the permit is required (emphasis added) to further a bona fide and necessary or desirable scientific purpose, taking into account the benefits anticipated to be derived from the scientific research contemplated and the effect of the proposed taking or importation on the population stock and the marine ecosystem.

It is apparent that a permit which does not specify the species or the type of research cannot meet such a standard, though such permits have been granted. It is apparent that research which adds to the general body of biological knowledge but does not specifically benefit the species taken cannot meet such a standard, but, again, such permits have been granted. We urge NMFS to more systematically and rigorously enforce these standards and regulations for the granting of scientific permits.

NMFS has been in the vanguard of international attempts to set standards for lethal "research" in the whaling operations of other countries. At last year's meeting of the International Whaling Commission (IWC), a resolution sponsored by the United States was passed. The following criteria for such research were among its provisions:

1. The research addresses a question or questions that should be answered in order to conduct the comprehensive assessment or to meet other critically important research needs;
2. The research can be conducted without adversely affecting the overall status and trends of the stock in question or the comprehensive assessment of such stock;

3. The research addresses a question or questions that cannot be answered by analysis of existing data and/or use of non-lethal research techniques; and
4. The research is likely to yield results leading to reliable answers to the question or questions being addressed.

It approaches hypocrisy for NMFS to push hard for rigorous scientific standards for other countries, while not demanding the same for research performed in the United States.

The aforementioned regulations also provide that the effect on individual stocks and marine ecosystems be determined.

Unfortunately, applicants need only pay lip service to this requirement by citing the size of the population and pointing out that the proposed research will only involve a small number of animals. No detailed population analyses are required. Recently, the Marine Mammal Commission expressed concern over the cumulative impact of public display and research permits on single stocks. Certainly, both lethal and non-lethal research can cause modifications in behavior and disrupt social structures. Only after being challenged in court did NMFS begin to pay attention to this requirement.

Recommendations: More rigorous criteria should be set up for any research which involves the lethal taking of marine mammals. Attention needs to be given to the utility of such research. The standard that the research be required for a necessary scientific purpose should be strictly adhered to, and an assessment of the benefits of such research should be made. The burden of evidence should be placed on the permit applicant to prove the necessity of such research.

In the case of marine mammals which are listed as endangered or threatened under the Endangered Species Act or as depleted under the MMPA, an even more stringent standard is required. Research permits should not be granted where an individual from a listed species died from other than natural causes unless it can be demonstrated that the research will directly contribute to the recovery of the species or knowledge of the species population biology.

In the case of tissues imported from other countries, NMFS, which is part of the Department of Commerce, apparently has difficulty dealing with the well-established constitutional concept of the stream of commerce. They have basically issued a disclaimer of responsibility for all species legally killed in their country of origin. Such a standard is not sufficient, however. Most notably in the case of endangered species, it would be naive to assume that all countries have adequate laws for the protection of such species. The routine approval of scientific research import applications allows the importation of products from commercial kills even when those kills may be contributing to the further depletion of a species. Even the application of regulations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is not sufficient because some countries are not members of CITES and others have taken reservations on specific species which exempt them from CITES regulations.

In some instances, the issuance of such permits may actually contribute to the demand or be used to justify a take. The latter was most vividly illustrated when the only scientist mentioned by name in the "research" proposal submitted by Iceland to the International Whaling Commission dealing with the take of two endangered species was an American. Use of the loophole in the International Convention for the Regulation of Whaling has enabled several countries to continue commercial whaling under the guise of science. In such circumstances, the issuance of a research permit may be interpreted as implicit U.S. government approval of a lethal taking. It is the height of sophistry to argue (as individuals in NMFS have done) that a research permit is not directly involved in the take and that the two can be antiseptically compartmentalized.

There have also been procedural difficulties with the administration of this section of the Act. Although the law provides that hearings may be held if there are significant questions on a specific permit application, NMFS has developed a boilerplate response -- almost invariably negative. Significant policy questions which had ramifications far beyond the individual permits apparently have not merited such a hearing. As examples of such policy questions, we would cite the first inclusion of sport fisheries under a general incidental take permit and the importation of tissues from whales taken in "research" hunts.

Recommendations: Research permits for imported tissues should take into account the conditions which made the tissues available in the

first place. Other countries do not have laws as stringent as the MMPA, and marine mammal populations continue to decline in many parts of the world. The products should be treated as part of the stream of commerce with the assumption that the end user is part of a continual process. In the case of imported tissues, the same criteria should be used as if the animal had been killed within the jurisdiction of the United States. If an initial take does not meet such standards, e.g., impact of the take on individual stocks and the ecosystem, importation of tissues should not be permitted.

DISPLAY PERMITS

There have also been problems associated with the issuance of display permits for captive marine mammals. Some of these problems are attributable to NMFS and others to the standards set by the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture or the enforcement of those standards by APHIS. As in the case of research permits, the approval process has become so routine that even questionable applications are routinely approved.

To illustrate some of the problems, a particularly egregious example from 1987 merits discussion. A permit to take bottlenose dolphins was issued to an applicant despite a previous record which included:

- o numerous prior deaths attributable to poor care;
- o animals dying from ingestion of foreign substances;
- o dolphins kept in fresh water rather than salt water;
- o dolphins succumbing to transportation stress;
- o the capture of four dolphins only a year earlier, without a permit in direct violation of the law.

The example is illustrative of several problems. First, approval to take captive cetaceans has been granted despite grossly inadequate facilities. Second, insufficient attention is given to the previous record of applicants. If that record demonstrates mortalities of animals previously permitted, it should be a primary factor in determining whether or not a permit for additional animals should be granted. There are also animals which may not be suited for aquaria. If there is a consistent record of high mortality in captivity for a particular species, display permits for that species should not be granted. Finally, if an applicant has a record of serious violations of either MMPA or APHIS regulations, the agencies should not give them the opportunity to violate the law again.

One reason that inadequate facilities have been granted permits may be lack of adequate coordination between NMFS, the agency that issues the permits and APHIS, the agency charged with ensuring the welfare of the animals in captivity. Some coordination apparently takes place between NMFS and APHIS and we applaud that cooperation. However, NMFS, in its permitting role, has turned the entire job of site inspection and the storage of site records over to APHIS, to the extent that facility specifications are no longer required on permit applications. The facility simply notes its USDA license number on the application. This creates a system where records concerning the facility can be scattered across the country in various government offices. To get a truly complete picture of the

institution and its practices, including capture methods for the various animals, stock assessments, facility specs and veterinary care records, either agency would have to go to at least two sources and possibly to a third, since some APHIS records are stored in regional offices. This division of information is likely to present problems in communication between the agencies. Indeed, in one case, an APHIS site inspection was used to grant a permit to a zoo in the state of Washington for dolphins. No one seemed to be concerned that the zoo was about to build an unheated tank. After the dolphins were brought to the tank, the temperature dropped to below freezing. One animal died and two others had to be rushed to another facility.

Recommendation: Record keeping and the entire permitting process should be re-evaluated for the best possible coordination among NMFS, APHIS and the MMC. The informal interagency cross-checking now taking place should be broadened and formalized.

Statutory language should be added that the previous record of an applicant should be considered in issuance of subsequent permits.

The purpose of display permits under the MMPA is the education of the public concerning marine mammals. Applications often tout the notion that displays of marine mammals exist for the "public benefit". Yet, year after year, display permits are granted to completely commercial enterprises, such as private clubs and hotels. It is difficult to imagine that displaying these animals does anything to benefit the public; rather they are benefitting the owners of and investors in these highly profitable businesses.

Aquaria also point to their educational programs. We submit that the importance of public education in aquaria is entirely secondary to their potential as entertainment outlets and money-making ventures. After watching trained seals balancing balls on their noses or killer whales (orcas) splashing spectators or waving to the audience with their flippers, one is hard pressed to find any educational content in these shows. A similar view was expressed by the eminent wildlife expert, Dr. Stephen Kellert of Yale University in "Attitudes Toward Animals: Age-related development among children," published in the Journal of Environmental Education. In this study Dr. Kellert questioned 267 children in grades 2, 5, 8 and 11 concerning the kinds of animal-related activities in which they had participated within the previous two years. For instance, 93% of the students questioned had visited a zoo, 87% owned a pet, 87% had fished and 83% had learned about animals in school. Other activities, such as feeding birds, reading about animals in books and magazines, watching a television show about animals, hunting and trapping were also mentioned in the survey. The students were then tested concerning basic knowledge and attitudes about animals, including an attitude which Kellert terms "negativistic", an orientation characterized by "active avoidance of animals due to indifference, dislike or fear." In his findings, Kellert states,

Particularly surprising were the relatively low knowledge scores of children who learned about animals in schools or who visited zoos. Moreover these two groups had the highest negativistic scale score. These activities thus appeared to exert little positive influence on children. Most zoological parks continue to fail to go beyond superficial

entertainment toward instilling greater appreciation of animals among children...

In a speech entitled, "The Educational Potential of the Zoo and its Visitors," presented at the Conference on Informal Learning in Zoos at the Philadelphia Zoological Gardens on September 26, 1986, Kellert described some of the possible reasons for the lack of educational success when he stated,

...education has and continues to be a minor objective of most zoos. I base this claim on a cursory examination of the typical allocation of resources at most zoos, on the kinds of personnel usually employed, on the prestige often associated with the function of education and on the sometimes superficial and even trivial consideration education receives at many zoological parks.

Studies similar to these have not been undertaken to see what effect visiting aquaria has on children's knowledge and attitudes toward animals. However, since most aquaria appear to devote even less of their time and resources to educational activities, we suspect the results of such a study would be similar to Dr. Kellert's.

Recommendation: A stronger definition of public education is needed and standards for level and content of educational material should be set. Plans for educational programs should accompany permit applications.

Although NMFS requires that a schedule for the frequency of shows involving captive marine mammals be submitted with a permit application, there is little reason to believe that they question

or even review this information as a part of the permit process. The animals of a current permit holder perform in shows for 30 minutes out of every hour from 9am to 6pm 362 days a year. There is no indication that NMFS or, for that matter, APHIS, has ever felt this situation warrants concern.

Recommendation: Standards should be set by both agencies to ensure the welfare of performing marine mammals. Time spent performing should be of reasonable duration and frequency, with ample time for rest between performances.

We also believe that insufficient attention is currently being given to the impact on stocks when animals are removed from the wild. As an example, orca pods in Puget Sound have not recovered to former levels despite total protection for almost fifteen years after several animals were removed for display. Certain cetacean species also have complex social structures which may be disrupted by the removal of animals. In granting permits for capture, NMFS needs to be mindful of potential impacts on the ecosystem and on populations remaining in the wild.

Recommendation: Cumulative impacts of removing animals from the wild should be part of the criteria for consideration of permit applications. Such standards should be extended to animals imported from abroad that were not born in captivity.

The suggestion has been made that Congress should change the MMPA to allow the capture of marine mammals from species designated as depleted for enhancing the propagation or survival of the species. We categorically oppose this change. No aquarium has shown that it

can successfully propagate and restore to the wild even non-depleted species. Furthermore, we have never seen a serious proposal to do so. Until it can be demonstrated that such programs can, in fact, be developed with non-depleted species, we feel that no change is warranted in the Act.

Futhermore, the suggestion that depleted stocks can be restored by a captive propagation program is unrealistic. It would require that births and rehabilitation to the wild of literally thousands of animals before an impact could be made on any stock. We do not think, therefore, that there is serious concern over the status of the species, but rather such language has another purpose, i.e., the capture and display of depleted species.

It has been stated that such language would make the Act consistent with provisions of the Endangered Species Act. We are concerned that this provision has been abused in the ESA and that the purpose behind this language is often ignored. Use of the phrase, "to enhance the propagation or survival" is routinely used to justify permits under the ESA even when there is little connection to ensuring survival of the species in the wild. As an example of how this provision is used, several times a month, the Fish and Wildlife Service approves the importation of trophies taken in hunts in the Republic of South Africa. In each instance, the person applying for the permit argued that importation of the trophy would enhance the survival of the species. In light of

experience with the ESA, we are opposed to putting a similar loophole in the MMPA when there is almost no possibility that institutions can affect the status of any stock.

To deal with the problem of orphaned animals (and also stranded animals), we would not oppose allowing institutions to take and care for them subject to two provisions: that efforts be taken to restore the animal to the wild when it is rehabilitated and the improvements discussed below for dealing with stranded animals are incorporated.

Recommendation: The MMPA should not be amended to allow display permits for take of depleted species.

Although standards for maintaining marine mammals in captivity are set by APHIS under the Animal Welfare Act, they are far from adequate and need to be revised. The minimal standards for cetaceans are little short of scandalous. The minimum pool size for Group I cetaceans, which includes such species as bottlenose dolphins, beluga whales, orcas and pilot whales, is a diameter of 24 feet or two times the average adult length of the species, and a depth of six feet or one half the average adult length of the species. Such dimensions would hardly be adequate for a backyard swimming pool, and humans are not aquatic animals. Furthermore, the regulations provide that two animals may be confined in such a watery prison cell. Holding and training pools in which marine mammals may spend much of their time are not required to meet even

these pitiful standards. Other standards such as sound baffling in pools where cetaceans are kept are entirely absent.

NMFS has a responsibility to examine the adequacy of facilities when granting a permit, but deference is given to the standards (and records) of another executive department. Although the regulations have been promulgated under the aegis of the Animal Welfare Act, the purposes of the MMPA cannot be fulfilled unless those regulations are overhauled.

A major deficiency in the regulations concerns facilities which rescue stranded marine mammals and attempt to nurse them back to health. At the present time, these facilities are not required to obtain a USDA exhibitor license, as facilities which house healthy marine mammals are. Licensing would ensure that these stranding facilities are inspected yearly by APHIS veterinarians. In addition, some of these facilities have held stranded animals for extended periods of time, all the while allowing public display of the animals. We believe that if healthy animals deserve the protection that APHIS monitoring affords them, sick animals deserve the same, if not more, consideration.

Recommendation: Any facility which houses marine mammals, even temporarily, should be required to be licensed and inspected by APHIS.

Records indicate that the incidence of stress-related illnesses,

such as ulcers, in captive marine mammals, may be high. The yearly Marine Mammal Inventory Report required of facilities is not sufficient to provide an "early warning system" of illnesses in the animals. Semi-annual status reports, including veterinary examinations, should be required for all marine mammals held in captivity. Any veterinary treatment of the animal within the reporting period should be detailed in the status report.

Recommendation: Twice-yearly status reports on all captive marine mammals should be submitted to NMFS and APHIS.

It would seem to go without saying that attending veterinarians in facilities which house marine mammals should be trained in marine mammal medicine. The uniqueness of marine mammals -- their size, the logistical problems of their handling, the very nature of their marine environment -- makes marine mammal medicine very different from any other veterinary specialty. Yet NMFS has no requirement that attending veterinarians at aquaria be anything other than a Doctor of Veterinary Medicine. The same credentials are required or APHIS veterinarians.

Recommendation: Training in the treatment of marine mammals should be necessary for all the veterinarians charged with insuring the health and welfare of captive marine mammals. This should include both attending vets at the facilities and APHIS Veterinary Services inspectors.

We believe that there is absolutely no justification, educational or otherwise, for travelling circuses and seasonal facilities which include exhibits of marine mammals. The incidence of

stress-related illnesses in captive marine mammals who reside continuously at only one facility has already been mentioned. To subject these animals to the stress inherent in their twice yearly seasonal transport for what can only be described as dubious educational benefit is not justified.

Recommendation: Display permits should be granted only to facilities which house marine mammals on a year-round basis. Seasonal transport of marine mammals should not be permitted.

We have also heard rumors of a problem which could arise in the future. For lack of a better term, it could be called marine mammal "laundering". In order to avoid more stringent U.S. requirements on the taking of animals, they may be captured abroad and cached there for a couple of years. When a marine mammal permit is applied for, the animals are listed as animals held in captivity rather than as animals taken from the wild. All too often, legislative action is taken only after a problem occurs. In this instance, it may be relatively easy to prevent a problem before it occurs.

Recommendation: Animals not born in captivity should be treated as if they were taken from the wild regardless of where they have been temporarily housed.

We are extremely concerned about recent applications for permits to capture dolphins for the purpose of using them for so-called "swim with dolphins" programs. Two recent applications, one by a private club and one by a resort hotel, hint at the commercial value that this kind of enterprise could have. On April 1, 1988,

NMFS held a public meeting to allow testimony concerning the need for standards for this kind of program. Such standards would protect the public from danger and the animals from exploitation. At that hearing, NMFS announced that it would not issue any further "swim with dolphin" permits until standards were set. We commend NMFS for its far-sightedness in this matter. The idea of swimming with dolphins may prove so appealing to the public that the current trickle of applications to NMFS will soon turn into a torrent.

Recommendation: Standards for "swim with dolphin" programs should be developed.

OTHER PERMITS

It has been shown that whale watching cruises can have an impact on the whales being observed. In vulnerable areas, it has been necessary to formulate regulations for these enterprises. Regulations to ensure the protection of these animals should be extended to other areas.

Recommendation: Language should be added to the MMPA to require all commercial whale watching boats be subject to the permit process.



Center for
Environmental
Education

TESTIMONY ON INCIDENTAL TAKE PERMITS IN COMMERCIAL FISHERIES
UNDER THE MARINE MAMMAL PROTECTION ACT

for the
Subcommittee on Fisheries and Wildlife Conservation
and the Environment
of the House Merchant Marine and Fisheries Committee

prepared by

Dr. Steven Swartz and Suzanne Iudicello,
Center for Environmental Education

on behalf of

The Conservation Community MMPA Reauthorization Coalition

presented by

Bo Brickleyer, Greenpeace U.S.A.

May 10, 1988

Whale Protection Fund • Seal Rescue Fund • Sea Turtle Rescue Fund • Marine Habitat Program

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The testimony which follows is endorsed by these organizations:

American Cetacean Society
American Humane Association
Animal Protection Institute
California Marine Mammal Center
Cetacean Society International
Defenders of Wildlife
Environmental Defense Fund
Friends of Animals
Friends of the Earth
Friends of the Sea Otter
Greenpeace USA
Humane Society of the U.S.
International Fund for Animal Welfare
International Wildlife Coalition
National Alliance for Animal Legislation
National Audubon Society
North Wind Undersea Institute
Oceanic Society
Society for Animal Protective Legislation

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The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) is the most comprehensive marine mammal conservation and management legislation in the world. For more than 15 years it has protected whales, porpoises, seals, sea lions, walruses, sea otters, polar bears, and manatees, through its major provision: a moratorium on the taking of all marine mammals by persons subject to U.S. jurisdiction.

This prohibition on taking marine mammals (which includes hunting, capturing, killing or harassment) is lifted, however, under several major exemptions provided in the Act. The Secretary of Commerce or Interior may determine, on the basis of scientific evidence and advice, whether it is appropriate to waive the prohibitions on taking and importation of marine mammals for a number of purposes. These are for research and display, for subsistence uses by coastal Alaskan Natives, for incidental takes during commercial fishing operations, and for incidental takes of small numbers of animals during non-commercial fishing activities, such as oil and gas exploration.

The following testimony is in two parts. The first is a discussion of the marine mammal species which interact with commercial fisheries, and how those interactions have affected their population status. The second will focus on the procedures for the waiver, issuance of regulations, and permitting for incidental takes during the course of domestic commercial fishing activities.

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TESTIMONY OF
STEVEN L. SWARTZ, PH.D.
MARINE MAMMOLOGIST FOR THE
CENTER FOR ENVIRONMENTAL EDUCATION

I am a scientist that has spent the past decade specializing in the study of the biology and population dynamics of marine mammals, and it is in this regard that I wish to present the following points.

Like ourselves, marine mammals are predatory animals that consume fish. Subsequently we find that we compete more and more with marine mammals for marine resources and, increasingly for marine habitats as we extend our industries and development along our coasts and across our seas. Unlike marine mammals, we have a powerful technology that allows us to invoke rapid change into the areas we choose to exploit. Unfortunately, these changes often include the disruption of marine habitats, the over-exploitation of living resources, and pollution from wastes and toxics. Unlike natural perturbations, human related changes are occurring at much faster rates, and we are often unable to foresee the ultimate consequences of our actions. Marine mammals must live with changes that our technology produces, and already we are seeing warning signs that something is going wrong in our seas.

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For far too many years our "out of sight, out of mind" mentality has lulled us into believing that we may use our oceans as liquid dumps. As a result, virtually all of our coastal areas are feeling the effects of pollution and habitat disruption. These areas are the nurseries for our major fisheries that support billions of dollars of industry each year. Similarly, this habitat loss is effecting marine mammals as well. Last summers die-off of 700 or more bottlenose dolphins along our eastern seaboard was an event unprecedented in recorded history. Although still under investigation, scientific experts and other authorities agree that the polluted waters in this region could only have contributed to the deaths of these animals. Last December, 15 humpback whales, 4 minke whales, and 2 fin whales all died within a few weeks along the Cape Cod/Gulf of Maine coast, apparently from eating fish that contained toxins. Why these fish became tainted with toxic material in concentrations that were lethal to these whales is unknown, but suggest that something may be out of balance in this coastal area.

Habitat loss is an even greater threat to marine mammals and to our fishing industries (and all marine life) than over-exploitation and depletion. For without healthy habitat, no marine animals can survive, and ultimately we also will be unable to survive. The Marine Mammal Protection Act is one of the principal wildlife conservation acts that has provisions for the

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protection of marine habitats upon which all marine species depend. In concert with other wildlife legislation, the Marine Mammal Protection Act provides us with a means of regulating our development and industry along our coast and within our seas.

Marine mammals are long-lived animals that reproduce slowly. Unlike fish, once depleted their populations require long periods to recover. This biological fact was learned as we watched worldwide populations of large whales decline to dangerously low levels that resulted in a moratorium on commercial whaling adopted by the International Whaling Commission in 1982, that went into effect in 1985. Similarly, some species of seals and sea lions have been reduced to low levels, and many continue to decline at rates faster than they can replenish themselves. Once depleted, it requires many years for populations of marine mammals to recover to what is defined in the Marine Mammal Protection Act as "Optimum Sustainable Population Level (OSP)."

One of the major considerations for the reauthorization of the Marine Mammal Protection Act is the incidental killing of depleted and declining species in fishing activities. Logically, any take of these species will only contribute to their continued decline, and presents us with a significant challenge. Some marine mammal species which are declining at precipitous rates continue to be incidentally and intentionally taken by our

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commercial fishing fleets, and will soon become depleted. The Marine Mammal Protection Act prohibits the killing of species which are depleted; the Act requires that managers must undertake regulatory measures to assure that species "not be permitted to diminish below their optimum sustainable population (OSP)..." and that will "replenish any species or population stock that has diminished below that population level." 16 U.S.C. 1371(2). Unfortunately, our state of knowledge for many marine mammals is so poor that OSP determinations cannot be made. Recently the courts have ruled that permits to take species for which OSP cannot be determined cannot be issued by the National Marine Fisheries Service. Enforcement of the Act, then, threatens many fishing industries that take marine mammals with complete closure. To compound this problem, programs that were designed to provide us with information on the status of marine mammal populations, and the levels of these animals that are taken by fishing activities have, and continue to fail to provide us with meaningful data. Thus, managers have resorted to what it appears as "dart-board" conservation practices based on the best available information. As a result, the conservation community challenges these decisions, the fishing industry is compromised, and the marine mammal populations suffer.

A proposal has been jointly drafted by members of the fishing community and the conservation community that we feel will

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provide the initial programs to develop an accurate and reliable management system based on scientific information under the Marine Mammal Protection Act. Our proposal describes a series of programs that will yield information which we desperately need to protect marine mammal populations that are in trouble today, allowing the fishing industry to continue to fish, and most importantly initiate a data-base upon which management decisions can be reliably based in the future. This program includes education, research, information development, monitoring, and analysis components. Because these problems belong to all of us, this program requires participation by the fishing industry, conservation community, regulatory agencies, and the Congress.

We have a responsibility to ourselves to protect our livelihoods, and a responsibility to marine animals to protect their lives. The recognition of this responsibility indicates that we have begun the transformation in attitude from a society of unbridled consumers to a people that know and appreciate the importance of ecological balance to our survival and our quality of life. We have the technology, we have the know how to turn the tide, and we have the spirit necessary to meet these challenges. The program we propose is not a quick fix, because there is no short-term solution to our long-term problems. Solving our difficulties will require a change in management philosophy and public attitude coupled with ongoing efforts over many years just

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to undo what has already occurred. We ask that you give serious consideration to the proposal before you, not just in concept, but with appropriations that will make the Marine Mammal Protection Act the competent manager of marine resources that it was intended to be.

This concludes my prepared statement. I thank the Subcommittee for the opportunity to provide you with these views.

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The current process for permitting incidental takes of marine mammals in domestic commercial fisheries, as implemented by the National Marine Fisheries Service, has been shown to have numerous problems. Among these are: (1) the determination to waive the moratorium is to be based on scientific evidence, but such evidence does not exist for most species; (2) permits are issued to an entire class of fishermen, without accounting for the number and diversity of the fisheries within the class; (3) although the regulations call for a system of participation and reporting by individual fishermen, participation has been limited at best; (4) although the permits establish number limits on the takes of each species granted in the permit, without reporting and without any monitoring of the fisheries, the actual level of incidental mortality of marine mammals is unknown; (5) without knowledge of the level of takes in fisheries, there is no mechanism to trigger any mitigating efforts should the takes reach a level that poses harm to the species and population stocks subject to the interactions.

1. Scientific evidence on which to base a decision to waive the moratorium and allow incidental taking does not exist.

Before issuing permits to allowing the incidental taking of marine mammals in commercial fisheries, the agency, according to the provisions of the Act, is required to make a finding that such taking "will not be to the disadvantage of those species and population stocks." 16 U.S.C. 1373(a). At the present time, the

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only marine mammal species taken in commercial fisheries that have been determined to be above optimum sustainable population (OSP) are the Dall's porpoise, several species of dolphins, northern elephant seals and northern sea otters. (See additional testimony prepared by Dr. Steven Swartz, Center for Environmental Education).

In 1984, the National Marine Fisheries Service (NMFS) issued eight, five-year general permits to domestic commercial fisheries on the West Coast allowing the take of more than 6,400 marine mammals. ^{1/} Since then, NMFS has indicated in published documents that at least one of those species, the northern fur seal, is depleted. Another, the Steller's sea lion, is declining, and NMFS is proposing that it be listed as depleted. Incidental and intentional takes in commercial fisheries are cited by agency scientists as a major cause of the decline. Further, a species which the Service knew would be taken, the harbor porpoise, was not included in the permits. Numerous attempts by the conservation community to elicit a statement from the agency that this species was either above OSP and could be included in the permit, or was below OSP and could not be taken, have been unsuccessful. The agency's response to inquiries was that the status of the harbor porpoise stock was unknown.

The lack of scientific information on the status of marine mammal populations and stocks which have interactions with

^{1/} 2,120 Steller's sea lions; 45 northern fur seals, 1,835 California sea lions, 2,155 harbor seals, 60 elephant seals, 200 cetaceans.

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commercial fisheries is disturbing to the conservation community, which is concerned about the effect these interactions is having on the status of these species, particularly the two which are known to be declining. The lack of information also is problematic to the fishing industry, which now must reapply for general permits which expire at the end of this year. The uncertainty over whether the agency will even be able to issue permits for incidental takings of species about which it knows very little, let alone whether the takings will pose a disadvantage to the stocks, led to the development of a joint proposal from the conservation community and the fishing industry for amendments to the Act to address this lack of information.

A detailed description of the proposal (submitted to the Committee under separate cover) will be presented by Mr. Bricklemeyer and Mr. Cowles. Among its elements, though, is a mechanism for making determinations about the status of marine mammal populations. These determinations have, to the present, been undertaken within the agency without any timelines. For at least one species, the northern fur seal, the process has dragged on for more than two years. It is our belief that an amendment to the Act that provides a formal process for such determinations, sets deadlines, and involves scientists from both within and without the agency, will contribute to a more effective MMPA.

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2. Permits are issued to an entire class of fishermen, without accounting for the diversity of the fisheries within the class.

Presently, permits for the incidental taking of marine mammals in domestic commercial fisheries are issued in two ways: through a waiver of the moratorium, promulgation of regulations, and issuance of a general permit under Sections 1373 and 1374, or through the granting of a small take exemption as set out in Section 1371(a)(4).

As implemented by NMFS, this system has resulted in the granting of general permits to the North Pacific Fishing Vessel Owners Association, representing all fishing operations off the coast of Alaska, and to the Pacific Coast Federation of Fishing Associations, representing all fishing operations off California, Oregon and Washington. Under current regulations, the types of general permits issued to these two entities are for four categories: towed or dragged gear, purse seines, stationary gear, and a catch-all category which includes troll, longline and gillnets. Two small take exemptions also have been granted, one for owners and operators of U.S. menhaden vessels in the Atlantic and Gulf of Mexico, and one for groundfish gillnetters in New England. The following comments do not address the small take exemptions.

The first drawback to this system is that each of the umbrella associations, while holding the general permit, not only have no authority to elicit compliance from their various member associations, they do not even represent all the fishermen who

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operate in the extensive geographic areas covered by the permit. Since no attempt ever has been made to enforce the conditions of the permits, it is unknown how the agency might do so--or even if it could. Would the association be liable for a permit violation by one of its "members?" Upon whom would penalties be assessed? If the quota for a species were exceeded in a gear category, would the entire permit become invalid for all gear users of that type? Under the present system, these remain unanswered questions.

The second problem with this system is that it fails to recognize the fact that fishing is conducted on an area-by-area, fishery-by-fishery basis. A lump allocation of, for example, 1000 Steller's sea lions among all trawl fisheries that operate off the coast of Alaska in an entire year adds nothing to our ability to monitor interactions and mitigate harm to marine mammals where necessary. In that category, in Alaska alone, there are more than 200 vessels, ranging from 70-foot coastal draggers to huge, offshore factory trawlers operating in an area that covers thousands of square miles of ocean. The present permit system gives the agency in charge of protecting marine mammals no handle at all on what is going on among these diverse trawl fisheries--and they are the most homogeneous group among the permitted gear types.

The worst example of the inadequacy of the structure of the present gear categories is in Category 5, which combines in one permit trollers, longliners, and gillnetters. These three gear types are so unlike in their configuration and operation that it is impossible to make any sense of what is going on in their

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interactions with marine mammals. Under the current structure, the agency has, in effect, allocated an aggregated take of more than 2000 seals, sea lions and small cetaceans to fisheries ranging from salmon trollers in Southeast Alaska, to black cod longliners in the Gulf to herring gillnetters in Bristol Bay. And it has no way of telling whether these fisheries actually do take mammals, and if so, where, how, or how many.

NMFS is at present undertaking an examination of the general permit process and the effects of incidental takes in commercial fisheries through a draft environmental impact statement to be developed in conjunction with the reissuance of the general permits. During the scoping process on that DEIS we have urged the agency to issue permits on a fishery-specific basis. Without connecting the permitted incidental take of marine mammals to the specific fisheries in which such takings occur, the agency has no means by which to mitigate such takings or to regulate fisheries where the takings reach a level that poses harm to the species or population stocks.

3. Participation in the permit system is abysmal.

The present general permits allow more than 20,000 fishermen from San Diego to Kotzebue to kill more than 6,000 marine mammals during their fishing operations without any exposure to the penalties of the MMPA. All they are required to do for this exemption from the moratorium is (1) get a certificate of inclusion (at no charge), and (2) report any takes of marine mammals.

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In 1987, 70% of the trawl vessels covered under the general permits applied for certificates. Despite the fact that they are required by law to do so, only 9% of those vessel operators holding certificates submitted any reports on marine mammal interactions. And this gear category has the highest level of participation in the fleet.

Among the other gear categories, participation ranges from a low of 2% certificate holders among fishermen using stationary gear, to 48% of purse seiners holding certificates. Not only do these fishermen not acquire certificates, even those who bother to get the certificates do not report interactions. Only 2% of the certificate holders in the stationary gear category submitted reports; 13% of purse seiners holding certificates reported.

Of the more than 13,000 gillnetters, longliners and trollers licensed to fish in Alaska, Washington, Oregon and California, only 3500 got certificates in 1987, and of those only 568 submitted marine mammal take reports--about 16%.

Representatives of the fishing industry have indicated their willingness to undertake an information and education campaign among their members to improve the level of participation in the reporting system. The conservation community supports such a campaign, and has pledged to participate in its development. While education will, we hope, encourage more fishermen to participate in reporting and contributing to our information base about marine mammal-fishery interactions, it will not be enough.

If reports submitted by fishermen are to be of any use in protecting marine mammals from harmful levels of incidental mortality, they must be accessible, and keyed to a fishery-

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by-fishery data base. Such a data base is another element of the joint proposal, and essential to filling the information gap which presently exists.

4. Without monitoring, the level of incidental mortality of marine mammals in fisheries is unknown.

In this system where the only indicator of the level of mortality of marine mammals is through a small number of reports submitted by fishermen, it is clear we have a serious information gap. Even if reporting is improved ten-fold, there still must be a better means of monitoring and verifying the level of take of mammals in fisheries. Without such verification, the agency responsible for the management of these species is doing little more than throwing a dart at a board when it sets allowable take levels in permits. Furthermore, once the limits are set in the permits, the agency has no way of knowing when the limits are reached.

U.S. fisheries policy is presently in a mode described as the "Americanization" of operations in our fishery conservation zone. Where five years ago foreign vessels fishing in U.S. waters carried observers who tallied not only catch, but also marine mammal takes, this is no longer the case. Increased participation by U.S. vessels has eliminated direct observations of incidental takes in all but a few fisheries. A few states have observer programs for certain fisheries, and information on marine mammal takes is available from these programs, but they represent only a small portion of coastwide fishing activity.

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The conservation community recognizes that onboard vessel observer coverage throughout the entire, diverse domestic fleet is not feasible. In some particular fisheries onboard observers will be possible. We have worked with representatives from different types of fisheries which are known to interact with marine mammals in an attempt to identify a number of alternative methods of verifying levels of incidental take. These alternatives are laid out in the joint proposal and will be described in more detail by Mr. Brickleyer and Mr. Cowles. We look forward to continuing to work with the industry, the NMFS and state resource management agencies to fine-tune these alternatives, and believe they will contribute further to developing an information base from which decisions about marine mammals can be made.

5. The current system contains no mechanism to trigger mitigating efforts if takes reach a level that poses harm to marine mammals subject to interactions with fisheries.

The incidental taking of marine mammals in fisheries often reaches levels that, for some populations such as Steller's sea lions, contributes significantly to the decline of the species or population stock (Loughlin et al, 1983, Loughlin and Nelson, 1986, Loughlin et al, 1987). With the rapid development of new fisheries and the expansion of existing fisheries in U.S. waters, incidental taking is likely to increase unless more effective means for reducing interactions can be developed.

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Officials from the NMFS have acknowledged that as the current general permit system operates, it is virtually impossible to enforce and serves more as an information gathering mechanism than a regulatory one (O'Hara et al, 1986). Even if reports were received sufficient to indicate a harmful level of incidental mortality for a particular species, it would be impossible for the agency to step in with regulatory measures designed to mitigate that take. Because neither permits nor reporting are segregated by fishery, the agency would have no options for mitigation short of shutting down the entire gear category covered by the permit. This lends no help to a situation where the harmful effects of incidental take may be limited to a specific geographic area, a specific species, a specific time of year, or a particular fishery practice.

Although the Act enables the Secretary to modify existing permits, no procedures or processes such as recovery plans or mitigation measures have been developed by the agency. In conjunction with the recommended improvements to the data gathering system of the MMPA, the joint proposal provides for the triggering of protective measures should information indicate that they are necessary to protect a marine mammal species or population stock. Such measures will be necessary if the permit system is to be anything more than an annual tally of the mortality of marine mammals in fishery interactions.

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Conclusion

In conclusion, we urge the Committee to consider amendments to the MMPA that will allow domestic commercial fisheries to continue to operate, yet continue to provide the protections to marine mammals that were intended by the Act. The amendments outlined in the joint proposal from the conservation community and the fishing industry would accomplish this by: (1) improving our scientific information base about marine mammals, (2) establishing procedures and deadlines for determinations on the status of marine mammal populations, (3) devising a permit system that reflects the way fisheries operate, (4) implementing measures to increase the level of reporting by fishermen, and (5) providing the agency with the tools to intervene where necessary to protect marine mammal species and population stocks that are adversely affected by fishery interactions.

ENVIRONMENTAL DEFENSE FUND

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TESTIMONY OF MICHAEL J. BEAN,
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before the

SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT

of the

HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

on the

REAUTHORIZATION OF THE MARINE
MAMMAL PROTECTION ACT

May 10, 1988

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The Environmental Defense Fund supports the reauthorization of the Marine Mammal Protection Act. Since the Act's passage in 1972, many marine mammal populations have rebounded from numbers that had been much reduced. Certain factors that had contributed to the decline of some marine mammals have been brought substantially under control, most notably the drowning of porpoises incidental to commercial fishing operations of the American tuna fleet.

Despite these considerable successes, important problems remain. The dramatic decline in porpoise deaths attributable to the American tuna fleet has recently been substantially offset by an increase in deaths caused by foreign fishing fleets. The level of porpoise mortality thought to exist only four years ago was then regarded as indefinitely sustainable; the level today may not be. Despite the fact that many marine mammal populations have rebounded significantly since the Act's passage, others have not. At least two, the Steller's sea lion and the north Pacific fur seal, are in the midst of a steady, long-term decline. For these, the Act's potential benefits have not yet been realized.

In the testimony that follows, two subjects will principally be treated. The first is the alarming increase in porpoise deaths attributable to foreign tuna fishing and the Administration's recalcitrance in carrying out the requirements

of the 1984 amendments to the Act to address that problem. The second concerns the population standards that the Act embraces.

THE TUNA/PORPOISE ISSUE: THE ADMINISTRATION'S REFUSAL TO
IMPLEMENT THE 1984 AMENDMENTS

Congress enacted the Marine Mammal Protection Act in response to the alarming decline of marine mammals throughout the world. Among the more conspicuous of these problems was the drowning of huge numbers of porpoises in the course of commercial tuna fishing. This massive mortality occurred as a result of a fishing practice known as purse seining "on porpoise." Because schools of yellowfin tuna in the eastern tropical Pacific Ocean often swim beneath schools of surface-swimming porpoise, fishermen discovered that a highly effective means of catching tuna was to encircle a school of porpoise with a long purse seine, thereby trapping both tuna and porpoise within. Unfortunately, fishermen were not as successful in figuring out how to permit the escape of the captured porpoises. As a result, each year hundreds of thousands of these air-breathing mammals drowned or were crushed in tuna nets.

When it passed the Marine Mammal Protection Act, Congress believed that the drowning of porpoises in the course of tuna fishing could be dramatically reduced through refinements in gear and fishing techniques. Reflecting that belief, Congress embraced the goal "that the incidental kill or incidental serious

injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." This goal was to be achieved through a system of permits, gear requirements, on-board observers, and quotas limiting the number of porpoises killed each year. Implementation of these measures was not without controversy. Nonetheless, dramatic progress was made. By the early 1980's average annual porpoise mortality caused by American tuna fishermen had been reduced to less than 20,000, a more than 90 percent reduction in a decade. In addition to this absolute decline, the rate of mortality, expressed as a number of porpoises drowned per ton of yellowfin tuna caught fishing "on porpoise", fell to only about 0.25.

From the outset, Congress was aware that the porpoise problem was not solely an American problem. Although the American fleet was dominant, other nations were also involved. The federal government could directly regulate the fishing methods and gear of the American fleet, but it had no such authority over foreign vessels. To influence their fishing practices and to deter the evasion of regulatory requirements by transferring American vessels to foreign flags, Congress had to rely on indirect measures. Thus, it prohibited the importation of any fish that "have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States

standards."

In practice, the Act's restriction's on the importation of fish proved unsatisfactory. Although the Act directed the Secretary of Commerce to "insist on reasonable proof" concerning foreign fishing practices, the Secretary typically accepted the paper certification of a foreign government that it met the Act's requirements. Rarely, if ever, did the Secretary have any actual knowledge of the numbers or rates of porpoises killed by any foreign fleet. Despite the absence of such data, the Secretary regularly assumed that foreign vessels killed porpoises at rates equal to those of U.S. vessels. Meanwhile, the size of the U.S. fleet fishing in the eastern Pacific steadily declined, while the foreign fleet grew. In light of earlier repeated concerns that stringent regulation of U.S. vessels might cause their transfer to foreign fleets, the Secretary might well have concluded from this change in relative fleet sizes that the actual fishing practices aboard foreign vessels were considerably more lax than they were represented to be by foreign governments.

Despite the Act's requirements respecting the importation of foreign-caught tuna, the Secretary of Commerce never failed to approve imports from any nation that submitted information in support of its application. Although imports were barred from several countries, in each instance it was because those countries never sought approval under the Marine Mammal

Protection Act, usually because their tuna products were already barred from the United States under authority of other laws. By 1984, Congress was persuaded that the Act's provision governing importation of tuna needed strengthening. The resulting amendment directed the Secretary to require of the government of any exporting nation "documentary evidence" that it had "adopted a regulatory program governing the incidental taking of marine mammals ... comparable to that of the United States" and that "the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels." Thus, from July 17, 1984, the Act sought to bar from the U.S. market yellowfin tuna from any nation that could not demonstrate that both its regulatory program and the average rate of incidental taking achieved under that program were comparable to those of the United States.

Notwithstanding this unambiguous congressional directive, the Secretary took no immediate action to change the manner in which he had theretofore approved tuna imports. Rather, he continued to permit imports from nations known to be fishing on porpoise, notwithstanding that he had no information that their incidental taking rates were comparable to those of United States vessels. It was not until more than two years after the 1984 amendments, on August 13, 1986, that the Secretary even proposed regulations to implement their new requirements. Those proposed

regulations languished for another nineteen months before the Secretary issued final regulations on March 18, 1988.

In issuing the final regulations, the Secretary acknowledged for the first time the error of his prior longstanding assumption that foreign kill rates are the same as those of U.S. vessels. In fact, he now acknowledges that the kill rate for the aggregate foreign fleet "may be up to four times higher than the U.S. rate." He does not -- and cannot -- contend that such dramatically higher kill rates are "comparable" to those of U.S. vessels, a legal necessity for continued importation into the United States. Rather than enforce the unambiguous requirement of the law, however, the Secretary has elected to postpone it again, this time to 1991, seven years after Congress mandated the changes that the Secretary has steadfastly refused to implement.

The Secretary attempts to justify his action by arguing that overly stringent regulations (i.e., regulations that would require immediate compliance with the requirements that were statutorily mandated four years ago) might cause foreign nations to seek other tuna markets rather than improve their porpoise kill rates in order to resecure access to the U.S. market. As a result, the U.S. might be unable to "retain influence" over those countries and thus lose whatever leverage it has to reduce their kill of porpoise. Further, the Secretary attempts to justify his regulations by arguing that they are necessary "to minimize

disruptions in supply of raw tuna to U.S. processors." These considerations, assuming they have any factual foundation, are either impermissible or irrelevant. They cannot justify a failure to carry out the clear terms of the Act.

The Secretary claims that his regulation is necessary "to minimize disruptions in supply of raw tuna to U.S. processors." The short answer to this concern is that it impermissibly elevates economic consideration over conservation considerations. Beyond this, the claimed disruption is entirely speculative, for as the Secretary's own environmental assessment acknowledges, it is likely to occur only "if processors are unable to make up the shortfall through increased purchases of tuna from domestic vessels or other tuna harvesting nations." Moreover, any adverse economic impacts on domestic processors may be offset by economic benefits to domestic boat owners, for, as the Secretary has noted "[l]arge scale, long-term prohibitions on imported unprocessed yellowfin tuna from ETP nations might also result in a positive impact on U.S. boat owners and operators through higher ex-vessel prices for their catch. Higher ex-vessel prices might also result in reactivation of part of the inactive U.S. tuna fleet." Thus, even if the Secretary could elevate economic considerations over conservation considerations, which he cannot, it is far from clear that the economic consequences of implementing the law as it is written would be anything more than an a wash for the U.S. economy.

Finally, it is unclear why possible disruption in supplies to domestic processors is an overriding consideration when considering possible embargoes under the Marine Mammal Protection Act, while it was never such a consideration when tuna imports were barred under other statutory authority. In the past, tuna imports from Mexico, Ecuador, and Peru were all embargoed under authority of the Fishery Conservation and Management Act in retaliation for their seizure of U.S. vessels fishing in exclusive economic zones that we did not recognize. Imports from Spain were at the same time embargoed under authority of the Tuna Conventions Act. If disruption of supplies was not a reason for withholding statutorily mandated embargoes under those laws, it clearly cannot be under the Marine Mammal Protection Act.

A second justification for the delay in imposing the statutory requirements is the concern that to impose them immediately might lead any nation whose products were banned from our market to look for markets elsewhere rather than try to reduce its rate of porpoise mortality to assure continued access to that market. To demonstrate the basis for this concern, the Secretary cites the example of Mexico, which, after having its tuna banned from our market, developed new markets in Europe that now make it largely independent of the U.S. The Mexican example, however, is not nearly as compelling as the Secretary asserts.

Mexican tuna was initially banned for reasons having nothing

to do with marine mammals. Mexico claimed exclusive jurisdiction over all fisheries within 200 miles of its coast. The United States refused to recognize this claim with respect to tuna, which, under our Fishery Conservation and Management Act is considered to be "highly migratory", and therefore not within the exclusive jurisdiction of any coastal state. When Mexico seized an American tuna vessel fishing within its 200 mile zone, the United States responded, under authority of the FCMA, by banning further imports of Mexican tuna. Subsequently, Mexico never even requested a renewal of its Marine Mammal Protection Act authority to export tuna to the United States. Thus, an embargo against importation of Mexican tuna under authority of the Marine Mammal Protection Act was added to the preexisting FCMA embargo.

The standoff with Mexico over tuna continued for more than five years and was always primarily over whether the waters within 200 miles of its coasts were within its exclusive jurisdiction or open to American tuna fishermen to come and go as they pleased. From the Mexican perspective, the issue was fundamental, directly involving its national sovereignty. Rather than compromise that sovereignty by submitting to American demands, Mexico took its fish elsewhere. Having successfully developed new markets in Europe, Mexico continues to export most of its fish there and relatively little to the U.S., despite having reached a rapprochement on the jurisdictional issue.

While other nations might respond to a closure of the U.S. market under the Marine Mammal Protection Act by seeking markets elsewhere, Mexico's example is hardly convincing evidence that they will do so. For Mexico, the alternative was to sacrifice national sovereignty; that it was willing to go to the lengths it did to avoid knuckling under to U.S. pressure on an issue of national sovereignty is not surprising. That it or other nations would go to similar lengths because of Marine Mammal Protection Act requirements is far less likely. Moreover, the United States need not be a passive bystander if foreign nations look to Europe or other markets as substitutes for a closed American market. Section 108 of the Marine Mammal Protection Act directs the Secretary, through the Secretary of State, to "initiate negotiations ... for the development of bilateral or multilateral agreements with other nations for the protection and conservation of all marine mammals." Through such negotiations, the U.S. might reach agreement with other nations that would keep them from importing tuna caught without regard to marine mammal concerns. The action of the EEC in closing or considering closing European markets to seal pelts, kangaroo products, and furs acquired with steel-jawed leghold traps suggests that European authorities may well be receptive to such overtures.

The Secretary's regulations, by postponing until 1991 compliance with the requirements that Congress mandated in 1984, fail to carry out those requirements and are plainly inadequate.

They must promptly be revised to require that foreign nations exporting tuna to the United States demonstrate that they are in fact achieving incidental mortality rates comparable to those of U.S. vessels.

THE ACT'S POPULATION STANDARDS

The remainder of this testimony addresses an entirely different matter. When the Act was passed in 1972, it sought to ensure that marine mammals would not become peripheral and insignificant components of the marine ecosystems in which they occur. Rather, it was the object of the Act that marine mammals remain (or be restored to) vital, functioning elements of their ecosystems, capable of contributing to the dynamics of those ecosystems. That central idea was embodied in the Act's formulation of a new standard for the management of marine mammals, the standard of optimum sustainable population or "OSP".

Since its inception, the OSP standard has received its share of criticism, most frequently because the scientific data available with respect to many marine mammals is so limited that the determination whether a particular marine mammal is at its OSP level is often very difficult. This fact, coupled with the Act's precautionary, conservative prohibitions against taking marine mammals unless they are at their OSP level, has resulted in regulatory hurdles for those whose activities may take marine

mammals directly or indirectly.

The suggestion has sometimes been made that the population standard of the Marine Mammal Protection Act is unnecessary, because the Endangered Species Act provides an adequate "safety net" against any calamitous decline in marine mammal populations. According to this view, the concepts of OSP and "depleted" species are unneeded. That assertion, however, rests upon an unpersuasive foundation. By the time most species are listed under the Endangered Species Act, they have already been so reduced in number that they have ceased to be vital, functioning elements of their ecosystems or to contribute in any significant way to the dynamics of those ecosystems. Thus, in practice, the Endangered Species Act has been, for most of the species it ostensibly protects, the authority for carrying out last ditch efforts to rescue species from imminent demise. Its record of success over the past fifteen years is spotty at best; only a handful of species have actually recovered to the point that its protections are no longer needed; as many or more have slipped further toward the brink of extinction and at least a few altogether over it.

The Endangered Species Act may provide a safety net, but not one that gives much assurance that the more ambitious objectives that motivated Congress in passing the Marine Mammal Protection Act can be attained. Rather than abandon those objectives and

the population standards through which they were to be attained, it is appropriate to examine ways to attain them still in light of the experience in implementing the Act. One constructive approach is represented by the recent efforts of fishing industry and conservation community representatives to carry out a dialogue through which both the goals of the Act and the needs of commercial fishermen might be met. The finer details of those efforts can be left to others to explain. Let it suffice for present purposes to note that there is general agreement that a focused program of research, verification of reported interactions between marine mammals and various fisheries, recovery planning, and -- most importantly -- the resources with which to do these things, can provide a much more solid base of information than now exists for achieving the objectives of the Act.

TESTIMONY OF
COMMERCIAL FISHING INDUSTRY REPRESENTATIVES

RELATIVE TO THE REAUTHORIZATION OF THE
MARINE MAMMAL PROTECTION ACT
AND RENEWAL OF
MARINE MAMMAL PERMITS

INTRODUCTION

The following testimony is presented by Dr. Dayton L. Alverson for and on behalf of a group of commercial fishing industry representatives which has been involved in negotiations with several environmental groups for the purpose of reaching a consensus on issues relative to the reauthorization of the Marine Mammal Protection Act. The fishing industry groups involved represent substantial interests of Alaska residents fishing the Bering Sea and Gulf of Alaska, Northwest Indian Fisheries Commission members, various interests from Washington, Oregon and California as well as Seattle-based vessels fishing Alaska (which represent approximately 95 per cent of the harvesting capacity of the U.S. Exclusive Economic Zone off the coast of Alaska). These fisheries interests have joined together for the purposes of promoting an educational and scientific program which will (1) emphasize the relevant operative provisions of the Marine Mammal Protection Act, (2) stress the importance to the fishing community of avoiding, when possible, interactions with marine mammals which lead to incidental captures or unnecessary killings, (3) improve the state of knowledge of marine mammal populations and trends in their abundance, (4) expand the collection of fisheries/marine mammal interaction data and establish a system to verify incidental catches of marine mammals, and (5) establish a permit system to allow continued fishing operations

significant impact on the marine mammal populations. Industry leaders are convinced that current unlawful kills, however, can be significantly reduced and that fishing practices can continue and marine mammal population stocks maintained at healthy states. In order to achieve this goal, however, the fishing industry, environmental community and government must join in an accelerated and dedicated program of education, research and management. Society's goals of having a strong domestic fishing industry and at the same time maintaining healthy populations of marine mammals can be achieved, but only with the support of Congress during this reauthorization process.

LEGISLATIVE AND ADMINISTRATIVE REMEDIES

A "coalition" involving major environmental group leaders and substantial segments of the commercial fishing industry have been meeting to develop possible consensus on amendments to the Marine Mammal Protection Act (MMPA) and the Magnuson Fisheries Conservation and Management Act (MFCMA) which would allow continued fishing operations and bring the two statutes into parity with one another. This cooperative approach to achieve a workable amendment package is continuing and has resulted in agreement on most of the issues involved. Some details (discussed below) remain to be agreed upon, but the substance of an agreement is in place. The proposal offered by fishing industry and environmental community representatives includes the following approach to developing rational, long-term management for the conservation of marine living resources while avoiding disruption of commercial fishing:

- A. Fishing industry and environmental community representatives have adopted a joint statement of goals to include a commitment by both parties to cooperate with one another and with NMFS in acquiring and analyzing data upon which conservation of marine mammals can be based. In addition, the statement of goals will include a commitment to reduce fishing-related and unlawful mortalities

including the taking of marine mammals incidental to domestic commercial fishing operations.

DESCRIPTION OF THE INDUSTRY AFFECTED

Two west-coast associations are holders of record for the present General Permits required for vessels operating in association with Marine Mammals. These permits, which expire on 31 December 1988, cover the areas including all of the waters off the states of Alaska, Washington, Oregon and California. All vessels involved in nearly every fishery in the state waters and the United States' EEZ adjacent to Alaska, Washington, Oregon and California are fishing under the umbrella of these two permits. East coast and Gulf of Mexico fisheries have substantially different interests; thus, this testimony is addressing west coast and Alaska concerns only.

The fisheries included under the General Permit held by the North Pacific Fishing Vessel Owners' Association alone represent the largest segment of the nation's fishing industry employing an estimated 70,000 persons directly on approximately 14,000 fishing vessels. The annual ex-vessel value of these fisheries is estimated to exceed \$1.3 BILLION. The annual wholesale value from these fisheries products exceeds \$3 BILLION. The value-added figures resulting from processing and distribution to the retail level exceeds \$4.5 BILLION. In addition to these direct economic benefits, the processing, distribution and support industries are affected by the operations of this fleet, but an accurate value cannot be estimated. Nation-wide, the retail-level value of fisheries affected through the Marine Mammal Protection Act exceeds \$28 BILLION annually. This industry is of great importance to the nation and its continued operation is critical.

MARINE MAMMAL STATUS NOT ATTRIBUTABLE TO FISHERIES

Because of a severe lack of data, interactions between commercial fishing operations and marine mammals, and interactions between marine mammals and other marine mammals are not well understood. Certain unavoidable interactions, however, are known to exist. The

best documented incidental takes are those for the extensive foreign fishing operations and U.S./Joint Venture operations which have occurred off the coast of the contiguous Pacific states and Alaska. Data for these fisheries indicate that they have insufficient incidental kills to have any significant influence on population trends for marine mammals in these regions. For instance, the total take by trawlers (U.S. and foreign) of Northern sea lions in the Unimak Pass region (an area of concern for Northern sea lions) constitutes an annual mortality of less than 0.2 per cent of the population.

In addition to this unintentional, incidental taking, the Marine Mammal Protection Act and National Marine Fisheries Service regulations allow for the lawful lethal take of marine mammals in extremely limited circumstances to protect catches, fishing gear and personnel. The number of animals intentionally killed under the present permit process is estimated to be quite small. The combined level of incidental take and intentional lethal take by U.S. fisheries, however, is currently unknown, but factors such as disease, habitat modification and predation by other mammals (such as killer whales) are significant in explaining the decline of some of the population stocks of seals and sea lions.

We are aware of reports of intentional shooting of marine mammals by various ocean user groups outside of the permit structure and this must be a serious concern to both the environmental and fisheries leadership. These unlawful killings are enforcement and education problems that need to be addressed by the fishing industry and government. These unlawful takes are also NOT related to fishery interaction and are avoidable.

Industry representatives presenting this testimony who have been involved with discussions with the environmental community support rational management of all marine living resources, including marine mammals. We acknowledge concern that marine mammal and fish populations should be maintained at viable and productive levels. We are convinced that fishing activities can be conducted in their normal manner and areas without having significant impact on marine mammal populations, although a small number of occasional kills to protect catches, fishing gear and personnel are necessary. These permitted kills appear to present no

significant impact on the marine mammal populations. Industry leaders are convinced that current unlawful kills, however, can be significantly reduced and that fishing practices can continue and marine mammal population stocks maintained at healthy states. In order to achieve this goal, however, the fishing industry, environmental community and government must join in an accelerated and dedicated program of education, research and management. Society's goals of having a strong domestic fishing industry and at the same time maintaining healthy populations of marine mammals can be achieved, but only with the support of Congress during this reauthorization process.

LEGISLATIVE AND ADMINISTRATIVE REMEDIES

A "coalition" involving major environmental group leaders and substantial segments of the commercial fishing industry have been meeting to develop possible consensus on amendments to the Marine Mammal Protection Act (MMPA) and the Magnuson Fisheries Conservation and Management Act (MFCMA) which would allow continued fishing operations and bring the two statutes into parity with one another. This cooperative approach to achieve a workable amendment package is continuing and has resulted in agreement on most of the issues involved. Some details (discussed below) remain to be agreed upon, but the substance of an agreement is in place. The proposal offered by fishing industry and environmental community representatives includes the following approach to developing rational, long-term management for the conservation of marine living resources while avoiding disruption of commercial fishing:

- A. Fishing industry and environmental community representatives have adopted a joint statement of goals to include a commitment by both parties to cooperate with one another and with NMFS in acquiring and analyzing data upon which conservation of marine mammals can be based. In addition, the statement of goals will include a commitment to reduce fishing-related and unlawful mortalities

to the lowest levels practicable. The long-term goal is the establishment of comprehensive, ecosystem conservation plans on a regional basis.

B. The agreement includes the design and implementation of a permitting system to allow for the "taking" of marine mammals incidental to domestic commercial fishing operations, including species designated as "depleted" or treated as "de facto depleted" by NMFS. The limited exemption for the intentional taking of marine mammals under existing permits has been adopted for those populations showing an increase in numbers.

The issue of intentional taking of declining species, predominately the Northern sea lion, which is currently allowed under the regulations for the limited purpose of protecting catch, fishing gear and personnel remains to be resolved. The fishing industry approach is to establish a procedure based on the legitimate goal of reducing these mortalities by phasing in the prohibition. The industry negotiators have offered to eliminate the exemption for all Alaska fisheries except for the Alaska salmon gillnet fishery. The reason for this is simply that these fishermen, often in remote locations of Alaska, have continuously operated under the permits allowing such takings. Time is needed to educate these fishermen that such takings will become illegal. To impose the restriction (which involves a relatively small number of mortalities) on these fisheries before the benefit of an industry-supported education program will not totally eliminate the takings, but will make this limited protection a crime. A proposal was made to phase in the prohibition on intentional takings to protect catch, fishing gear and personnel over the three-year term of this agreement. The industry is committed to reducing all mortalities, but time is needed to change an attitude that has prevailed from long before enactment of the MMPA and is presently lawful under the Act. For example, a salmon gillnet opening may last for only twelve hours. If a fisherman (whose annual income may be only about \$7,000) in a twelve-hour fishery is faced with a sea lion which attacks his

catch and net, he expects to lose not only his \$3500 gillnet, but also his livelihood for the season. He will most likely take the course of action which has always been available to him and lethally deter the animal from his catch and fishing gear. The number of animal mortalities from this source appear to be very small, but the fisherman should retain the right to use such force in protection of his livelihood.

The National Marine Fisheries Service through a process similar to the present NEPA scoping procedure will, based on evidence from the public, establish a clear list of those fisheries which require marine mammal permits (Letters of Exemption) and those fisheries (such as Alaska king and Tanner crab and bottomfish longlining) which have such a rare occurrence of lethal interactions that no permits are required.

Reporting requirements under the proposed Letters of Exemption form a significant part of the present agreement. Data collected through the mandatory reporting system would be compiled and made available to NMFS by an independent, non-Federal Government organization. NMFS would retain enforcement authority.

C. The industry has begun and will expand an education program designed to increase the awareness of industry people regarding marine mammals issues. Initially, this program will address the need to eliminate unlawful lethal takes by various user groups of all marine mammals (an activity that is opposed by industry leaders and is NOT a fishery interaction), to expand awareness of the operative provisions of the MMPA and to increase knowledge regarding population stocks which are declining in numbers. The fishing industry, environmental community and government would establish agreed-upon levels of participation by each in the design and implementation of a long-range education program.

D. The parties agree to the establishment of a Population Status Review

Committee to allow scientists from the commercial fishing industry and environmental community to review and advise on all petitions for a change in the legal status of any marine mammal.

E. A revised permit process to develop an effective reporting system under the Letters of Exemption to achieve an effective data gathering information system is proposed. In addition, verification procedures are recommended to be applied where the need is clearly established. Several types of verification procedures are available. The parties to these negotiations have agreed to some form of vessel observers as a verification method. Details of how this observer program will function remain to be added to the agreement. The observer program will require federal support for funding, management under NMFS and a procedure to indemnify vessel owner/operators for liability for the observer. Industry and environmental representatives agreed that any observer program should be a marine resource program collecting data relative to any and all living marine resources, not just for fish or for marine mammals. There is further agreement that during the initial years of the program, emphasis may be placed on gathering marine mammal data through this program.

F. During each step of the negotiations leading to this agreement, we found that the tremendous lack of data (except the trawler data mentioned above) hampered decision-making efforts on both sides. Thus, the industry and environmental community place high priority on strengthening research efforts beginning in calendar year 1989. Without greatly increased research efforts through NMFS and the user groups, planning and conservation efforts appear fruitless. The industry commits its support for research programs and investigation of funding potentials. Through research and improved data gathering programs suggested

by the industry, questions presently unanswered about marine mammal interactions should be resolved. Congress, therefore, should appropriate adequate funds for the purpose of research through this reauthorization process. The research function may appear expensive, but the time has come to make up for past deficiencies and make this critical research component viable.

G. Development of a comprehensive Marine Mammals Conservation Plan is deemed appropriate by the commercial fishing industry spokespersons. This plan, developed through NMFS, would be based on a regional concept compatible with current fisheries practices and will be based on ecosystem management principles. This planning process can begin only after an adequate data base is in place. Meanwhile, however, NMFS should look at developing "Recovery Plans" which address the issue of organizing efforts in an efficient manner to determine the causes of population trends and appropriate methods, if any are needed, of helping the declining population stocks to recover. This plan must be based on sound data.

This proposal and commitment by industry and environmental group representatives envisions a cooperative effort with the industry, environmental community and NMFS and is based on a rational three-year time line.

To solve the immediate problem of allowing the industry to legally operate following 31 December 1985 (should the species be designated as depleted and NMFS continue its present interpretation of the Act), requires a prompt, narrowly defined solution. The parties to these negotiations highly recommend that Congress enact amendments to the Marine Mammal Protection Act and the Magnuson Fisheries Conservation and Management Act, as appropriate, and delegate the Commerce Department authority to promulgate needed regulations under its discretion to implement the terms of the agreement between industry and

environmental group representatives. In addition, Congress needs to provide adequate funding to support the various components of this program. Without proper funding, little can be achieved.

The commercial fishing industry and major environmental groups have agreed to continue close dialogue during this three-year period with a view toward reaching a consensus position on long-term cooperative strategies for the protection of marine mammals, without causing major disruption and hardship among various users.

IMPACTS OF LAW ON INDUSTRY AND THE NATION

Under the Marine Mammal Protection Act of 1972 (hereinafter referred to as the Act or MMPA), section 101(a)(4)(A), Congress recognized the value of U.S. commercial fishing to the nation and created exemptions to the moratorium provisions. Small incidental takes in conjunction with commercial fishing operations were specifically authorized, provided that the species or population stocks affected were not listed as "depleted, threatened or endangered."

MMPA, section 101(a)(4)(A): During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted. . . .

Section 104 of the MMPA also authorizes the Secretary to issue permits for intentional and incidental taking of marine mammals: "(a) The Secretary may issue permits which authorize the taking or importation of any marine mammal." Issuance of the General Permits must be consistent with regulations promulgated under Section 103 and with the requirements of Section 101 of the Act (Section 104 (h)). The permits now held for the west coast and Alaska were issued under Section 104.

Partially as a result of recent appellate court decisions, the National Marine Fisheries

Service (NMFS) has interpreted the Act in such a manner that NMFS has publicly announced that no permits under Section 104 may be issued. The reason stated for this interpretation is simply that NMFS is unable to determine the Optimum Sustainable Populations of most marine mammals found off coasts of the U.S. Thus, NMFS states that it must treat most species as depleted regardless of existing population dynamics and deny General Permit applications. A NMFS status of population stocks report is expected in late May 1988.

Species and population stocks viewed as affected by fishing operations off the coast of Alaska which present the greatest difficulties at this time are the following:

Northern (Stellar) sea lions--Eumetopias jubatus

Northern fur seals--Callorhinus ursinus

Harbor seals--Phoca vitulina

(The California sea lion populations are increasing rapidly and appear healthy.

Even these, however, may be treated as "depleted" under present NMFS interpretations.)

Administrators at NMFS have indicated that a designation as "depleted" for the northern sea lion and northern fur seal is possible during calendar year 1988. Such a designation could have immediate and far-reaching negative impacts on the commercial fishing industry and the nation's economy unless legislative changes are made. Denial of the General Permits (Section 104) and the inappropriate nature of the Small Take Permits (Section 101) for most of the west coast and Alaska fisheries is tantamount to making all fishing illegal or at high personal risk. The small take permits, however, do appear to be appropriate and sufficient for east coast and gulf coast fisheries. The loss of revenue, loss of employment and decrease in the available food supply for the nation should the industry be unable to fish, despite the lack of any documented scientific evidence that can associate the status of relevant marine mammal populations with fishing activities, is a very serious social question that Congress and our nation must face. Congress also must face the issue of funding to meet these societal needs. Obviously, the interests of both groups require your attention and a balance needs to be

achieved to ensure the continuation of fishing activities consistent with the conservation needs of both fish and marine mammals.

NO AFFECTED MARINE MAMMALS DESIGNATED DEPLETED

At this time none of the species concerned has been designated "depleted, threatened or endangered" by the Secretary under the procedures of the Marine Mammal Protection Act. The Department of Commerce, National Marine Fisheries Service, however, has established that the populations of the northern sea lion and northern fur seal have decreased and NMFS has begun the process of recommending that these two species be declared "depleted." The term "depleted" is established in reference to the Act's definition of Optimum Sustainable Population:

Section 3 (1): The term "depletion" or "depleted" means any case in which--

(A) the Secretary, . . . determines that a species or population stock
is below its optimum sustainable population; . . .

Section 3 (8): The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

A finding of "depleted," therefore, requires a determination of the "carrying capacity of the habitat." Scientific evidence exists to establish that the carrying capacity of the habitat for marine mammals is cyclical. Potentially, the carrying capacity (for any number of reasons) for the Stellar sea lion and northern fur seal populations is at a lower level than previously believed. Further evidence may establish that although the number of these animals has declined, they are not in a "depleted status" in relation to the carrying capacity of the habitat. NMFS marine mammalogists have not established the actual carrying capacity of the habitat. Lacking such a

determination, the species cannot properly be declared depleted under the language of the Act and permits should be issued. In any event, recognition is needed that evidence shows that these problems are not a direct result of commercial fisheries and allow the industry to continue.

Assuming, arguendo, that either or both of these species is declared "depleted," the MMPA appears inflexible on the issuance of General Permits involving the possible taking of depleted species:

MMPA 101(a)(3)(B): Except for scientific research purposes as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammals which has been designated by the Secretary as depleted. . . .

[Section 104 General Permits must be in compliance with Section 101].

Thus, if the northern fur seal and northern sea lion were designated as depleted under the Act, or if NMFS maintains its present interpretation, no General Permit may issue. If such a situation arises, some NMFS Administrators are of the opinion that the entire fleet operating off the west coast and Alaska will have to cease fishing operations or will be in violation of the Act because of potential interaction with depleted species. Such a harsh and economically devastating result was not intended by Congress.

If such a drastic result occurs, the industry, region and nation will face a crisis throughout the seafood industry of a magnitude never before encountered. NMFS and the Congress should act promptly to prevent such an occurrence by aligning the MFCMA and MMPA on an equal basis.

FISHERIES NOT INTERACTING WITH DEPLETED SPECIES SHOULD BE TREATED SEPARATELY

Under implementing regulations of NMFS, General Permits fall into five categories (50 CFR 216.24). The General Permit held by NPFVOA includes categories 1, 3, 4 and 5:

Category 1--Towed or Dragged Gear. Such as bottom or otter trawls, bottom pair

trawls, multi-rig trawls and dredging gear.

Category 3--Encircling Gear, Purse Seining not Involving the Intentional Taking of Marine Mammals. Purse seining operations which do not intentionally encircle marine mammals.

Category 4--Stationary Gear. Operations utilizing gear such as traps, pots, weirs, and pound nets.

Category 5--Other Gear. Operations utilizing trolling, gill nets, hooks and line gear, and any gear not classified above.

These categories (primarily category 4, Stationary Gear and category 5, Other Gear) group together unlike fisheries which have distinctly different interactions with marine mammals. Some of the fisheries may interact with marine mammals, but not potentially interact with northern fur seals or northern sea lions. Others, such as the king and Tanner crab and bottomfish longline fisheries, may have extremely rare lethal interactions. Because of the General Permit requirements, however, these fisheries are unnaturally combined. This unnatural designation of categories should be changed to separate out those fisheries which are conducted without serious risk to the marine mammals designated as depleted. New categories should be adopted by regulation to separate longlining and trolling from net fishing operations such as gillnetting. Longline operations should be a separate category. In addition, those fisheries which have only rare lethal interactions should be identified and clearly exempted from all of the permit processes.

UNINTENTIONAL "TAKING"

None of the fisheries covered by the General Permits involve the "Intentional" taking of

marine mammals, except as allowed under NMFS regulations and as possibly included in the Act's definition of harassment. The Act defines "taking" too broadly by including all forms of harassment (section 3, (12)). The General Permits issued to NPFVOA were amended to prescribe limited types of "harassment" using authorized devices. The current level of lawful intentional takes appears to be quite small. Under NMFS regulations an intentional lethal take of a marine mammal is authorized only after all permitted means to deter the animal have been taken and failed, and then only to prevent depredation of catch, damaging of gear or causing personal injury. (See 50 CFR 218.24(d)(1)(ii) and (iii), (3)(ii) and (iii), (4)(ii) and (iii), (5)(ii) and (iii)). The use of these non-injurious devices is a positive step which allows fishermen to frighten the marine mammals away from fishing gear which reduces or prevents serious injury or death to the protected animals. The use of these approved devices (whether a species is "depleted" or otherwise) should be exempted from the "taking" provisions of the Act and NMFS regulations, and officially recognized as appropriate methods of protecting the marine mammals from serious injury or death. An amendment to the Act should be proposed, if necessary.

SCIENTIFIC DATA INSUFFICIENT TO IDENTIFY

COMMERCIAL FISHERIES IMPACTS

The National Marine Fisheries Service has an obligation under the Act to gather scientific data relating to marine mammals management. A review of the reports generated from the data collected on shore and off the coast of Alaska shows that the populations of northern fur seals and northern sea lions are declining in some areas. These reports, however, fail to establish the inter-relationship with this decline and operations of the commercial fisheries. National Marine Fisheries Service reports following studies of the populations of northern sea lions, for example, report the decline of these animals from 1956 to 1986. These authors state, "The causes of the reduced fecundity or survival of the northern sea lions are presently unknown, but there are several possibilities--disease, changes in prey resources, and the

combined effects of these and other factors." NMFS marine mammal specialists state that the decline of the northern sea lion, for example, is not unique among pinnipeds. They recognize that marine mammal population numbers commonly follow a cycle, increasing and decreasing in relation to time and area. The causation factor remains difficult to identify, according to NMFS scientists.

NMFS data analyzed by industry scientists clearly show that there is no recognizable cause-and-effect relationship between the decline in marine mammal populations and commercial fishing activities.

INDUSTRY-GENERATED DATA NEEDED

The inability of the scientific community to establish the impact of fisheries on these marine mammals is significant and the commercial fishing industry should be allowed to continue operations until such interactions are understood. The National Marine Fisheries Service has an affirmative obligation under the Act to collect and analyze data for marine mammals, but has failed to do so. In the absence of NMFS programs, however, the commercial fishing industry does have potential for collecting needed data to effectively determine the impacts of commercial fishing on certain species and population stocks of marine mammals. Renewed efforts and appropriate funding for NMFS research, however, is preferred.

Current permit provisions require that any marine mammal killed will be discarded overboard. This requirement should be changed to allow scientific study of these animals. Indications are that disease is playing a substantial role in reducing the numbers of some species. Careful scientific study of animals will enhance our knowledge of the species, including food patterns, disease and other factors which are impacting on these population stocks.

CONCLUSION

The fishing industry and environmental community representatives are concerned that a prompt and acceptable solution to the questions presented herein be achieved. This solution, we believe, must recognize the needs of the commercial fishing industry to continue operations with economic efficiency, yet respect the desires of the environmentalist community while providing for the well-being of the marine living resources involved. To achieve this solution, the industry represented by this testimony is prepared to provide its assistance in establishing a rational program to provide improved education, increased data collection and long-range planning under the agreement reached with the environmental community. Only with strong support from Congress can these goals be reached.

TESTIMONY OF
BERING SEA FISHERMEN'S ASSOCIATION
AND
UNITED FISHERMEN OF ALASKA

presented by
HENRY V.E. MITCHELL

regarding
REAUTHORIZATION OF
THE
MARINE MAMMAL PROTECTION ACT

before the
HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES

Washington, D.C.

May 10, 1989

I am Henry Mitchell, the executive director of the Bering Sea Fishermen's Association, with headquarters located in Anchorage, Alaska. I am also on the executive board of the United Fishermen of Alaska, located in Juneau, Alaska. I am also president of a group called Americans for Marine Ecobalance, based in Portland, Oregon. For the record, I am also a member of the North Pacific Fisheries Management Council and on the Advisory Panel of the International North Pacific Fisheries Commission. Americans for Marine Ecobalance has submitted a separate statement for the record. I am pleased to have the opportunity to testify today on the reauthorization of the Marine Mammal Protection Act on behalf of Bering Sea and United Fishermen.

The Bering Sea Fishermen's Association (BSFA) is a commercial fishing organization representing some 1500 western Alaska residents who traditionally fish for salmon and herring from small boats. The region of Alaska that BSFA represents consists of the coastline starting from the North with Kotzebue and Nome and running South through Bristol Bay. This area includes the fisheries of the Kuskokwim, the Upper Yukon, the Lower Yukon, Norton Sound and Kotzebue--all relatively small and primarily conducted by Alaska natives--as well as the valuable fisheries of Bristol Bay. Incomes throughout much of this area are among the lowest in the nation. Most of the commercial fishermen of the area also conduct subsistence fisheries to provide their families with food for the year.

The United Fishermen of Alaska (UFA) is a private, non-profit, statewide organization for 20 fishermen's associations, including marketing and aquaculture organizations and several specific gear groups. Including some 1500 individual members, UFA has a total representation of some 12,000 fishermen from Alaska, Washington, Oregon and California, all of whom fish in Alaskan waters. It may help you to know that UFA has member groups based in Warrenton, Oregon, Seattle, Washington, and Anchorage, Dillingham, Cordova, Homer, Sitka, Sand Point, Petersburg, Ketchikan, Kenai, and Juneau, Alaska. UFA has been active on specific national fishing legislation and has recently expanded its efforts at the national level to increase public awareness of the importance of commercial fishing to the nation.

The Marine Mammal Protection Act (MMPA) is an important cornerstone of legislation dealing with our marine ecosystem. It is an important element of protection to the native members of BSFA and UFA. To the other members of UFA, it is a piece of

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legislation the goals of which we know to be important and within which we are learning to operate. You know that the commercial fishing community deals most frequently with the Fishery Conservation and Management Act (FCMA), and for years has discussed with you rational and legitimate methods of bringing closer together the elements of both the MMPA and the FCMA to assure more coordinated living marine resource conservation and management. As members of the conservation community, responsible fishermen and their organizations have long recognized the need to manage our fishery resources wisely. We have also been broadly supportive of other elements of environmental and conservation legislation aimed at protecting and preserving our marine environment, and have worked closely with "environmental groups" to proffer and promote rational conservation legislation. While we may frequently disagree with members of "environmental groups" on elements of legislation, it was, none the less, odd to find ourselves potentially on "the other side of the table" from the remainder of the conservation community when the issue of reauthorization of the MMPA began last year.

It was because the fishing community wished to continue working toward sound conservation and management legislation affecting the living marine resources that it established an industry working group and proposed to the rest of the conservation community that we attempt to develop a consensus position on the reauthorization of the MMPA. BSFA and UFA contacted Greenpeace last year to determine if they would be interested in putting together a delegation of environmental group representatives to talk with a similar group of fishing organizations on issues of mutual concern likely to be raised by one side or the other during the reauthorization process. Once agreed to, a large coalition of primarily West Coast commercial and recreational fishing interests (with observer-participants from various East Coast fishing interests) began to meet with a wide representation of the rest of the conservation community to develop a consensus on the most critical issue affecting the commercial fishing industry during MMPA reauthorization--how to deal with the current prohibition in the law relating to the take of depleted mammals incidental to commercial fishing operations conducted by U.S. fishing vessels.

Dr. Alverson is testifying today on the results of negotiations conducted over a two month period--an agreement in principle on how the two "sides" of the conservation community recommend to the Congress how we should work with NMFS and the states toward a more satisfactory system under the MMPA and the

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FCMA. BSFA supports the compromise and urges the Congress to adopt it to avoid any confusion related to the continuation of commercial fishing operations after the first of next year. UFA is currently reviewing the proposal with its executive board, many of whom have already gone out on the fishing grounds, causing some dislocation in the final review and approval process. As you are learning, it is a comprehensive proposal that will require a substantial effort and cooperation on the part of fishing associations and individual fishermen, NMFS, the states and the environmental community to make it work. It will also require the commitment of adequate funding. In essence, we all have a large role to play if this program is to be successful, as we all have a large stake in the success of the program.

Dr. Alverson will outline in some detail the elements of the proposal. I would like to make some observations on a few of them. First, every effort must be made to focus NMFS on working cooperatively with states and the conservation community as a whole. We are in our current predicament in large part because basic research and data collection and evaluation efforts have not gone forward. In essence, we have precious little information on which to make basic management decisions. At risk on one hand is the mammal population, about which NMFS still seems to be able to make few determinations required under the MMPA. On the other hand, failure to make those determinations creates frustration within the fishing industry, while letting hang over the industry's head concern about whether fishing operations will be able to be conducted after January 1, 1989 in a practicable manner. If NMFS does not gather adequate information on the status of mammals, there will be unacceptable consequences for both the fishing industry and the environmental community. We need the assistance of Congress in assuring proper direction is given to these efforts. While it is a tall order to gather, evaluate and act on the data necessary to proper management and conservation, we believe that both the MMPA and the health of the U.S. commercial fishing industry require it.

Second, the proposal calls for a largely industry-supported education effort. We believe this is a vital element in the success of data gathering, development of mitigation efforts, attempts at developing recovery plans and all other aspects of our joint proposal. We need Congressional direction to NMFS to work cooperatively with the states and the affected members of the conservation community to assure a successful education effort. If we are asking individual members of the fishing industry to "learn new ways," then they should be able to expect focused, rational implementation on the part of NMFS, which leads me to my next point.

Third, there need to be better efforts to coordinate the MMPA with the FCMA. The fishing industry and the environmental community have had substantial discussions during these negotiations to the effect that there should be more focus on the total living marine resources, allowing for better coordination within NMFS on management and conservation decisions. Data collection and evaluation need to be better coordinated; research efforts need to be better focused on real world problems and priorities; lines of communication need to be improved to minimize conflicts with affected conservation groups over matters of program development and implementation. Simply put, there needs to be greater awareness that, in this era of severe budget restrictions, closer cooperation and better prioritization need to occur.

Take, for example, the proposed observer program. Both industry and the environmental community believe the development of living marine resource observers is the appropriate step to take. By approaching our verification needs in this manner, we can assure more uniform and complete coverage of entire fisheries. Thus, to assure that a minimum percent coverage on a fishery by fishery basis throughout the EEZ off the Alaska coast, with observers being added when "further problem areas" are identified, for an appropriate period of time, makes sense when trying to develop adequate data on which to make management decisions. While it does not eliminate the need for government funding in these most important areas of fishery and mammal management and conservation, it does minimize duplication and waste. It provides data for a multitude of management purposes, including mammal interaction with fisheries and by-catch considerations.

An additional example is the effort to develop priorities within fisheries for data collection and verification. Certain fisheries with limited and non-continuing interaction with mammals should not have the same restrictive permitting and reporting requirements as fisheries with continuing and documented lethal or injurious interactions. There should be a method by which fisheries subject to the more extensive permitting and reporting requirements can "graduate" to the less restrictive, "rare" case, as is advanced in our proposal. That will allow data to be collected and evaluated in areas that are important to resolving mammal-fishery interaction problems, and avoid focusing on "non-problems."

A fourth observation has to do with an essential element of the proposal. As agreed, this approach applies only to U.S.

fishing vessel, as does the small take provision under current law. This includes the domestic fishing component of a joint venture. Substantial financial and other commitments are proposed under this agreement for industry to assume on their own as well as cooperatively with the environmental community and the federal government--education, research, verification, reporting and the like. To date, our segment of the industry has a good record of commitment to sound conservation and management practises. We have worked to see enacted strong plastics pollution, fisheries management, driftnet and other legislation that will provide for a more rational management of our nation's and the world's ocean resources. Now our segment of the industry proffers for your approval another step in wise management of our resources, and asks that you impose additional responsibilities on us in return for the limited take of depleted mammals incidental to our regulated fishing operations. Non-U.S. fishing operations are not similarly situated.

One final observation is in order. As of the time of preparation of this statement, the fishing industry and the environmental community are unable to agree in principle in only one regard--the ability of fishermen to have a directed lethal take of declining depleted mammals in defense of gear or catch. In essence, what the fishing industry has proposed is that a fishermen have, after taking all reasonable deterrent steps, the very limited ability to take a mammal intent on tearing up a net and denying a fisherman the ability to fish. Of all the issues, this has been the most difficult because it focuses the principles of both "sides" perhaps most precisely. We clearly understand the most awkward spot this issue places the environmental community. For the fishermen, it is a matter of livelihood. For example, in the salmon gillnet fisheries, Northern Stellers can tear up a \$3500 net, remove the catch and keep the fishermen from being able to participate in the remainder of a salmon "opening." The number of "openings" can be limited, and loss of gear, catch and anticipated catch can mean a substantial hardship. There is not a substantial number of such occurrences, but we do not want to make our fishermen law violators when it does occur, however infrequently. Both sides have spent a considerable amount of time trying to develop an acceptable compromise, but at this time we are sorry to say that we will jointly need to discuss this matter with the Committee in an effort to resolve it.

Mr. Chairman, we members of the fishing industry endorsing this agreement have come a long way in our efforts

since we began discussing reauthorization of the MMPA last summer. The members of the environmental community who negotiated this proposal with us have come a long way in their efforts to meet our operational needs while assuring what they feel is a proper conservation regime. As with any compromise, none of us is completely pleased with every aspect of the proposal. If adopted by the Congress, additional burdens will be placed on both communities. But rather than look at what each "side" is "giving," it seems to me that we need to understand what all of us will potentially be "getting" if this system is developed and implemented effectively. We hope this will lead to better management systems and processes, and better overall marine resource conservation and management. There seems to be the appropriate commitment on "both sides" to try to see that objective realized.

One final note. I would like to acknowledge for the record the active and helpful participation of the Alaska Crab Coalition during the entire conduct of these negotiations, and mention that they have asked me to advise you of their intention to file an additional statement.

We stand ready to work with the Committee in your review and consideration of this proposal, as you proceed to markup.

TESTIMONY OF
NATIONAL FISHERIES INSTITUTE
BEFORE THE
SUBCOMMITTEE OF FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
MAY 10, 1988

The National Fisheries Institute appreciates the opportunity to testify on the reauthorization of the Marine Mammal Protection Act (MMPA).

For those of you not familiar with the Institute, it is an association representing about 1,100 companies engaged in all aspects of the U.S. fish and seafood industry, including vessel owners and operators, processing plants and companies engaged in distributing and marketing. Our members are located throughout the United States.

One of the primary goals of the MMPA is to maintain the health and stability of the marine ecosystem commensurate with sound policies of scientific resource management. Unfortunately, the failure of the act to achieve this goal has prompted several debilitating controversies which have had to be resolved by Congress.

This year is no exception. Existing permits expire at the end of this year. Federal officials tell us that several species of marine mammals on the west coast may be at a level below their maximum net reproductivity. Recent court rulings suggest that the legality of the permits which allow U.S. vessels to take marine

mammals incidental to commercial fishing operations is in question. As a result, several billion dollars of economic activity and thousands of jobs are now at risk.

The Institute urges this subcommittee to act quickly and approve the amendments needed to resolve this problem.

Many instances can be cited where marine mammals cause economic losses in commercial fisheries. These losses are difficult to quantify nationwide, but in various fisheries they can be quite dramatic. They include gear damage, losses due to predation, damage to fish that have been netted or hooked, and the harm some mammals, particularly seals, cause as vectors for parasites that can infest fish and reduce their economic value.

A few studies suggest that the direct economic losses caused by marine mammals in some fisheries can exceed several hundreds of thousands of dollars. Only a few fisheries, however, have been studied. Moreover the biological interactions between mammals and fish are unclear despite years of research. Thus, some argue that marine mammals might prey upon living marine resources in ways that could benefit commercial fisheries. It is possible, therefore, that some of the economic losses caused by marine mammals may be partially offset in some fisheries through interactions which increase the abundance of commercially valuable species. We don't know.

U.S. commercial fishermen last year produced \$3.57 billion worth of fish and seafood. This covers everything from lobsters in Maine to the roe herring of Alaska. About \$450 million worth of this production was sold offshore to foreign buyers. Another

\$897 million was landed and then exported without further processing. This left about \$2.2 billion worth of product which entered the U.S. seafood system on its way to American consumers. By the time this production had been processed, distributed and marketed, it was worth many billions of dollars. Attached to this testimony is a chart prepared by the Institute showing these economic values.

These economic statistics, as large as they are, do not fully tell you about importance of the industry for the U.S. economy. Not included, for example, are the economic values associated with the many companies which provide our industry directly with goods and services, such as shipbuilding, fishing gear, fuel, food, etc. In many coastal communities the fishing industry is a major---if not the major---economic base. Our Institute is in the midst of a comprehensive economic assessment of these impacts which we hope will be completed later this year.

Federal officials are expected to announce shortly that they believe that several marine mammal species on the west coast are depleted. Other witnesses in these hearings will discuss the situation facing commercial fishermen on the west coast as a result of this action and recent court opinions which have suggested that no permits can be issued to allow commercial fishermen to take depleted species. Because they will discuss that region, I would like to focus my comments on the impacts these events could have on commercial fishermen in the Atlantic and Gulf of Mexico fisheries.

Several different species of marine mammals are found in the

fishing grounds of the Atlantic and Gulf of Mexico where they may interact with commercial fishing operations. These species include harbor seals, harbor porpoise, grey seals, white-side dolphin, common dolphin, white-beaked dolphin, pilot whales, Atlantic bottlenose dolphin and several others. None of these species is threatened or endangered under the Endangered Species Act. Also, none is depleted under the MMPA, nor are we aware of any proposal to list any as depleted. Indeed, a recent scientific report describes these species as being "at or near their original abundance."

Under section 101(a)(4) of the MMPA the incidental take of small numbers of marine mammals incidental to commercial fishing is allowed so long as the species or population stock is not depleted and the impact upon the species or stock is negligible. Guidelines for implementing this section were published in the Federal Register in 1983 (48 Federal Register 55493).

Two commercial fisheries in the Atlantic and Gulf of Mexico have operated the past few years under this authority. The first is the fishery for menhaden in the Atlantic and Gulf of Mexico.

In 1984 an exemption was issued to the National Fish Meal and Oil Association to take small numbers of marine mammals incidental to menhaden purse seine operations. This association is one of the divisions of the Institute. The exemption issued to us authorized the take of: (1) five Atlantic bottlenose dolphin in the Atlantic and five in the Gulf of Mexico; (2) five harbor porpoise in the Atlantic; (3) five pygmy sperm whales in the Atlantic and two in the Gulf; (4) two dwarf sperm whales in

the Atlantic and five in the Gulf; and (5) two minke whales in the Atlantic and two in the Gulf.

Since this exemption was issued the association has established a comprehensive monitoring and reporting program for marine mammals. At the beginning of each fishing season vessel captains are briefed on the program and given booklets to help identify animals and forms to report any takings.

No takings of marine mammals were reported by menhaden captains in 1984. In 1985 one incident was reported involving the taking of three Atlantic Bottlenose dolphins. All dolphins were set free of the net. In 1986 a single Atlantic Bottlenose dolphin was taken and freed without injury. In 1987 the taking of one dolphin in the Gulf of Mexico was reported (it was released uninjured). The association has reported these incidents to the National Marine Fisheries Service immediately and in a series of annual reports.

This menhaden exemption expires at the end of this year. By letter, dated March 23, 1988, the association asked for a 5-year extension of the exemption. So far we have received no response from the agency on our request.

A second exemption was issued in 1984 to a group of New England fishermen which authorized the taking of 180 harbor porpoise, 50 harbor seals and a total of 50 grey seals, white-sided dolphin, common dolphin, white-beaked dolphin and pilot whales in U.S. waters of the Gulf of Maine. This exemption, which also expires at the end of this year, allowed scientists working under contract with the Northeast Fisheries Center of the

National Marine Fisheries Service to assess interactions between marine mammals and fishing vessels. These scientists reported that 11 fishermen operating bottom-anchored gillnets during 1984 captured 30 harbor porpoise, 5 harbor seals and 4 grey seals, and that they believed this sample was about ten percent of all groundfish gillnetters fishing in New England.

Only one other series of marine mammal interactions has been documented in any systematic way along the east coast. For the past few years government observers aboard foreign fishing vessels in the Atlantic have recorded instances where marine mammals were captured in trawl nets. We have been advised very recently by agency officials that 124 mammals were reported in 1985, 85 in 1986, and 49 in 1987. This year we were told over 140 were taken. We also were advised that the species involved were pilot whales, common dolphins and Atlantic bottlenose dolphin.

U.S. trawlers also operate in this area and there have been sporadic and unconfirmed reports of takings. One report I have read estimates that about 50 animals might be taken by U.S. trawlers in the Atlantic fisheries. No monitoring program, however, has been set up under section 101(a)(4) of the act and so our information is anecdotal.

In addition to these takes there have been infrequent reports by fishermen of other interactions with marine mammals. For example, some New England fishermen are reported to have said that seals sometimes get caught in lobster traps, that marine mammals have been found in herring purse seines and that they

sometimes are hooked by longline gear. These takings, however, are unintentional and appear to be rare events.

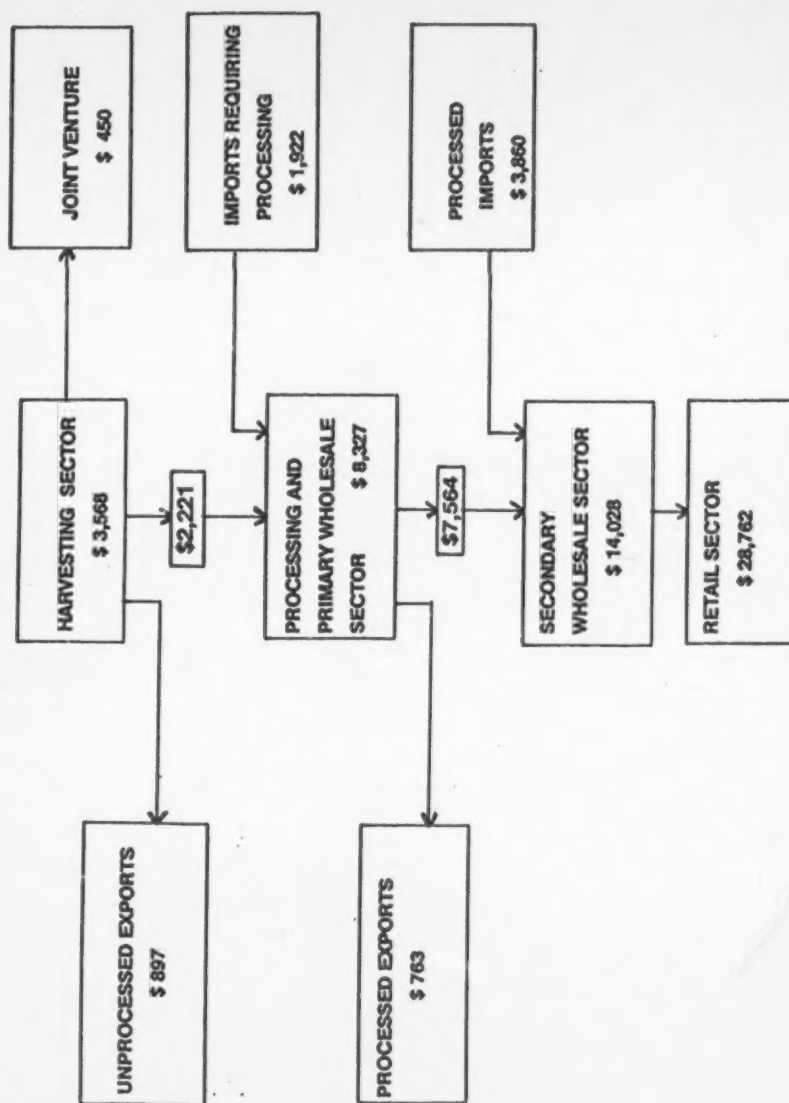
The Institute thinks that the small-take exemption of section 101(a)(4) continues to provide an appropriate mechanism to monitor marine mammal interactions with the fisheries of the Atlantic Ocean and Gulf of Mexico. If properly implemented, conservation programs under this section can monitor and report on takes, assist scientists and government officials in finding ways to better understand the condition of marine mammal population concerned, and help fishermen find ways to further minimize any incidental takes.

Few fishery organizations on the east coast are familiar with the process which needs to be followed to obtain an exemption. One of the questions raised in implementing this exemption is who should apply for an exemption given the great diversity of fisheries, fishing organizations and fishery management authorities. In the past few weeks I have discussed how commercial fishermen might best participate in marine mammal conservation programs with representatives of both environmental and fishing organizations. They have advised me that they believe that the best way to proceed is to encourage the trade associations concerned to set up programs as was done in the instances of menhaden and gillnets in Maine. In those instances where it would be helpful, associations could be encouraged to administer the programs in cooperation with scientists studying marine mammals.

I am confident that with the help of government officials

and the environmental community, more monitoring programs can be established under Section 101(a)(4) in the Atlantic and Gulf fisheries.

MARGINS AND EXPENDITURES FOR SEAFOOD PRODUCTS IN THE UNITED STATES, 1987
(MILLIONS OF DOLLARS)



TESTIMONY OF
WILLIAM E. EVANS
UNDER SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE
AND ADMINISTRATOR
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
DEPARTMENT OF COMMERCE

BEFORE THE
SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

MAY 10, 1988

Mr. Chairman and Members of the Subcommittee:

I am William E. Evans, the Under Secretary of Commerce for Oceans and Atmosphere and the Administrator of the National Oceanic and Atmospheric Administration (NOAA).

The Department of Commerce supports reauthorization of the Marine Mammal Protection Act (MMPA) of 1972. Since its enactment, the MMPA has been an important element of our Nation's wildlife conservation efforts. The MMPA recognizes that marine mammals are an important element of marine ecosystems and are resources of great aesthetic, recreational and economic significance, and establishes a comprehensive program for marine mammal conservation. The MMPA has been a key factor in the recovery of several populations. For example, the mortality of porpoise in the U.S. tuna purse-seine fishery has been reduced significantly, seal and sea lion populations along the west and northeast coasts are increasing, and the gray whale has recovered to near its original abundance.

We have made significant progress in managing marine mammals, but a number of challenges remain. There are increasing numbers of interactions between marine mammal populations and human activities. Since its inception in 1972, there has been a significant increase in our use of the oceans, especially the harvesting of finfish and shellfish under the Magnuson Fishery Conservation and Management Act (Magnuson Act). In many areas, this has been accompanied by an increase in resident marine mammal populations, partially because of the Marine Mammal Protection Act. These increases have resulted in an increasing number of conflicts between marine mammals and fisheries. These interactions are having serious emotional and economic effects on people, marine mammals and other marine resources. Marine mammals are being entangled in fishing gear, injured in collisions with boats, and sometimes illegally killed. At the same time, this entanglement damages fishing gear with reductions of catch resulting in serious economic losses. To give you an idea of how large the problem is, incidental taking associated with fisheries in U.S. waters involves over 20 species and 10,000 marine mammals. It is becoming more and more difficult to manage the taking of these marine mammals so as to allow the three-billion-pound American fisheries to continue. Our greatest challenge is to develop effective management strategies to deal with these interactions while keeping adverse effects on both the marine mammals and marine user groups to a minimum. One of the most notable successes in this area was the dramatic reduction in the number of porpoises taken in the purse

seine fishery for tuna in the Eastern Tropical Pacific (ETP). Our fishermen now average less than 20,000 mortalities per year. However, to achieve this progress significant costs had to be borne by the industry to buy and install porpoise saving gear and by the Federal government to conduct an observer program and a research program.

We support authorizing appropriations for the marine mammal protection activities of the Department of Commerce at a level of \$7,320,000 for fiscal year 1989 and at such sums as may be necessary for fiscal year 1990. However, we believe the MMPA needs to be revised to strengthen the enforcement provisions of the Act and to allow Federal agencies a broader range of management options to address present and future marine mammal-human interaction problems.

Depletion

Our immediate concern is the lack of authority to allow takes of depleted marine mammals incidental to commercial fishing operations. Unless this issue is resolved, the fishing industry could be faced with severe economic losses.

Under the MMPA, a species is considered depleted if it is below its optimum sustainable population (OSP) level. Takes from depleted populations are allowed only under limited circumstances, including subsistence by Native Alaskans, small takings incidental to activities other than commercial fishing, and scientific research. No taking of depleted species is allowed incidental to

commercial fishing. Gathering data to make determinations of the status of species with respect to OSP is very costly and time consuming. Thus we are not able to make valid scientific determinations regarding depletion for most species of marine mammals in a timely manner. If a species' status relative to its OSP cannot be determined, under the MMPA as judicially interpreted, permits to take that species incidental to commercial fishing cannot be issued. This is true even if the taking would not significantly affect the biological status of the population.

The National Marine Fisheries Service (NMFS) has interpreted its authority under the MMPA to include discretion to issue permits for incidental taking if the populations covered by the permit are within OSP, without proving that all other species that might be taken are also within OSP. However, in a recent decision involving a permit allowing a take of Dall's porpoise incidental to the Japanese salmon fishery, the United States Court of Appeals rejected NMFS's interpretation. In a two to one decision, the court ruled that NMFS did not have the authority to issue a permit for Dall's porpoise since other marine mammals (such as the fur seal) which were not demonstrably at OSP also were likely to be taken.

Unless this decision is overturned or Congress amends the Act, NOAA may not be able to renew the general permits to the U.S. domestic fishing industry that expire at the end of 1988 because depleted species or species of unknown status might be taken. NMFS

has begun the administrative process necessary to consider the reissuance of the general permits, and a range of alternatives is being evaluated in a draft environmental impact statement. However, some of these alternatives could not be implemented under the Court of Appeals' interpretation of existing law.

The fishing industry and the conservation community both recognize the seriousness of the problem and have formed a working group to develop a solution acceptable to all. This group is working to develop an amendment to the MMPA that would provide greater latitude in managing populations of marine mammals that are depleted or of unknown status by allowing a take incidental to commercial fishing provided that there are adequate safeguards for the affected marine mammal populations. We look forward to receiving the group's recommendations and will incorporate them, as appropriate, into our own legislative proposal.

Nuisance Animals

Some pinniped populations on the west and northeast coasts have increased to the point where they frequently damage other marine resources and cause significant losses of fishing gear and catch. Many of these interaction problems have not been resolved effectively. For example, since 1983, Federal and State authorities have attempted to prevent California sea lions from decimating a small run of steelhead trout in Lake Washington. Despite using harassment, taste aversion conditioning, and other non-lethal measures, we have not been successful in reducing

predation by these sea lions. NOAA, the fishing industry and the conservation community are working together to determine how to deal adequately with nuisance animals.

Enforcement

Effective administration of the MMPA hinges upon NOAA's ability to fully enforce its provisions. We believe that the MMPA's enforcement provisions are inadequate in a number of respects. The enforcement authority found in other statutes administered by NOAA, most notably the Magnuson Act and the Endangered Species Act, is superior to the MMPA. For example, the MMPA does not specify a standard for judicial review of administrative civil penalty actions and does not provide NMFS with sufficient subpoena and forfeiture authority or the ability to impose maritime liens and recover storage costs for seized marine mammal products. Shortly, we will submit to the Congress technical amendments to correct these deficiencies by making MMPA enforcement provisions more consistent with those in the Magnuson Act and other natural resource protection statutes.

Sale of Fur Seal Skins Taken in the Subsistence Harvest

Aleut residents of the Pribilof Islands want to sell fur seal skins taken in their annual subsistence harvest. Under the MMPA, byproducts of the subsistence harvest cannot be sold unless first made into authentic articles of native handicraft. However, the Aleuts want to sell raw skins to fur processors in the U.S. and abroad.

The purpose of the MMPA's prohibition on commercial sale of subsistence harvest byproducts is to limit the take of marine mammals to only those needed for legitimate subsistence and handicraft uses. Sale of raw skins may provide additional incentive to harvest the seals beyond subsistence needs. Further, other Native Alaskans might seek to sell subsistence byproducts such as ivory and teeth that were not made into traditional handicraft. Changes to the Native subsistence provisions of the Act would be acceptable to NOAA if the take remained truly for subsistence and if it could be adequately enforced. We will be happy to work with the Congress if it decides to address this issue.

Tuna/Porpoise

Congress amended the MMPA in 1984 to extend the general permit held by the American Tunaboat Association and to continue the quota on the taking of porpoise of 20,500 per year in the ETP. This allows the U.S. tuna fleet to continue fishing for yellowfin tuna in association with porpoise stocks some of which may be depleted. The 1984 amendments also required NOAA to undertake a five-year assessment of the affected porpoise stocks. This assessment has been underway since 1986. Besides using data collected on research vessels, NOAA is developing statistical methods to use information collected by observers on tuna vessels to monitor changes in the relative abundance of the stocks. In 1991, NOAA will determine whether the stocks of porpoise affected by the multinational tuna fishery are increasing, decreasing or stable.

The U.S. industry has remained below the 20,500 quota every year since the Act was amended in 1984, except for 1986 when the quota was reached in October. We are, however, quite concerned over porpoise mortality in the foreign segment of this fishery. The incidental take levels for the last four years were:

<u>Year</u>	<u>U.S. Vessels</u>	<u>Non-U.S. Vessels</u>	<u>Total</u>
1984	17,732	15,018	32,750
1985	19,205	36,032	55,297
1986	20,692	103,905	124,597
1987	13,992	64,505	78,497

Tuna Import Regulations

NOAA recently published regulations governing the importation of yellowfin tuna that we believe will greatly assist us in reducing porpoise mortality. In developing these regulations, the problem we faced was establishing requirements strict enough to immediately begin the reduction of porpoise mortality without causing foreign nations to develop alternative tuna markets and continue to fish for tuna without regard to porpoise mortality. We believe these regulations satisfy the major concerns of the conservation community and the industry. They provide for an observer program to monitor and report porpoise mortality, an annual certification program to assure compliance with U.S. requirements in order to continue exporting tuna to U.S. markets, and a comparability test that distinguishes variability in performance between small and large fleets of foreign nations.

Specifically, foreign nations purse seining in the ETP and wishing to export yellowfin tuna to the United States must prove to us that they have laws and regulations designed to protect porpoise. Their regulations and porpoise saving gear must be comparable to those of the United States. In addition, each nation must submit observer data collected on porpoise mortality. Starting next year, annual mortality rates must show improvement to remain "comparable." This improving trend in mortality must continue and by 1991 a foreign kill rate must be no greater than 25 percent above the U.S. rate if they have large fleets like Mexico, or 75 percent for smaller fleets.

We believe this gradually improving mortality rate meets the intent of the 1984 amendments. The alternative, imposing an immediate and equal mortality rate comparison test, would result in an almost total prohibition of import of yellowfin tuna from these nations. As a result of a U.S. prohibition, foreign nations would most likely develop alternative tuna markets and continue fishing for tuna associated with porpoise completely outside the jurisdiction of the MMPA. In addition to reduced porpoise protection, unrealistic requirements could put the U.S. tuna processors, especially those in Puerto Rico, at a severe disadvantage in the worldwide tuna industry.

We believe the most effective way to reduce porpoise mortality by all nations is through an international program among nations fishing for tuna associated with porpoise. Currently, the Inter-

American Tropical Tuna Commission (IATTC) is an effective partner in an international porpoise research program to reduce porpoise mortality in the ETP. This observer program provides the only source of scientific estimates of porpoise mortality for the international fleet. We will continue our cooperation and support for this international program in an effort to further reduce non-U.S. porpoise mortality.

The public comment period on the interim final regulations closes May 18, 1988. NOAA plans to hold a workshop in Washington, D.C., on June 1 and 2, to review comments on the interim final regulations received during the Senate and House hearings and those submitted during the public comment period. Participants in this workshop will include staff from the Senate Committee on Commerce, Science and Transportation and the House Committee on Merchant Marine and Fisheries, industry, conservation groups, the IATTC, and NOAA/NMFS. Following the workshop, NOAA will consider recommendations made by the group as well as from the comments received that may prompt modifications to the existing interim regulations. We believe this course of action will provide the best opportunity to satisfy the major concerns of the conservation community and the industry.

Status of Populations

The NMFS is responsible for over 100 species of marine mammals. Some of these populations are healthy or increasing, and others have been reduced or are still declining. Each year we

submit an annual report to the Congress that includes updated information on the status of marine mammal populations. We concentrate our research efforts on those species that are depressed or are affected by man's activities. We are conducting stock and impact assessments for species taken in domestic fisheries in connection with the reissuance of the general permits. These assessments will be available later this year.

Dall's Porpoise

For management purposes NOAA has determined that there are three populations of Dall's porpoise within U.S. waters: a Bering Sea, a western Pacific and an eastern Pacific population. The western Pacific and Bering Sea populations total over 950,000 and are well within their OSP. The eastern Pacific population is currently under review as part of the stock assessments for reissuance of general permits.

Dall's porpoise are taken in the Japanese salmon gillnet fishery within and outside of the U.S. Exclusive Economic Zone (EEZ) in the North Pacific Ocean and Bering Sea. In 1987, NMFS issued Japan a general permit that allowed a taking of about 6,000 Dall's porpoise during a 3-year period based on a determination that the stocks would not be disadvantaged. Based on the previously noted recent Court ruling, the Dall's porpoise permit is not valid since species that are not at OSP, such as the fur seal, would also be taken, albeit in small number. Although we are seeking reversal of the Court ruling, the Japanese salmon fishery

may not be able to operate this summer in the U.S. EEZ as contemplated by the International North Pacific Fisheries Convention (INPFC). As a result, Japan may withdraw from, or seek to renegotiate the INPFC. This would allow them to fish in areas where the take of North American origin salmon and marine mammals would be higher than when Japan fishes inside the U.S. EEZ and targets Asian stocks of salmon. Additionally, the denial of the Dall's porpoise permit will eliminate a cooperative U.S.-Japanese research program to place U.S. scientific observers on Japanese high seas squid driftnet vessels that operate entirely beyond our EEZ. We are very concerned over the impacts of this fishery on the North Pacific populations of Dall's porpoise, fur seals, salmon and other marine life, and we are therefore very concerned about the loss of this research opportunity as a result of this litigation.

Northern Fur Seal

The Pribilof Island population of North Pacific fur seal has declined from about 2.2 million in the 1950's to 800,000 today. Although the causes of the decline remain under investigation, the population has declined by over 50 percent. Therefore, we are designating the population as depleted, and expect to publish a final rule in the near future.

Since 1985, a subsistence harvest of fur seals has been conducted by Aleut residents of the Pribilof Islands following regulations under the Fur Seal Act and the MMPA. About 2,000 subadult male seals are harvested for food each summer. Season,

sex and age limits are set to protect the seal herd and estimated harvest ranges are reconsidered each year.

Steller Sea Lion

The Steller (Northern) sea lion population in Alaska has also declined significantly from about 140,000 in the 1950's to 68,000 in 1985. Most of the decline has occurred since the late 1970's. The causes of the decline remain under investigation, and fisheries-related mortality factors, including incidental take, directed killing by fishermen, changes in prey species, and entanglement in discarded fishing gear and other debris, have been examined as possible causes. NMFS is currently considering whether to propose this population for designation as depleted.

Six domestic general permits expiring in 1988 authorize an incidental take of a total of 2,130 Steller sea lions annually in the North Pacific. If Steller sea lions are found to be depleted, NMFS cannot issue permits for their incidental take, nor can it, under the Court of Appeals' decision on Dall's porpoise, issue permits for non-depleted species if inevitably these animals will be taken.

California Sea Lion

The California sea lion is another species that is taken incidentally in commercial fishing operations. This species interacts with almost every fishery on the west coast, causing most of the estimated \$600,000 annual damage from marine mammals to California's commercial fisheries. Despite an incidental mortality

of 2,000 to 3,000 animals a year, the population has increased from about 40,000 animals in 1972 to 80,000 animals today and is continuing to increase at about 6.5% per year.

In the past, NOAA has issued general permits authorizing the incidental take of California sea lions because the population was large, inhabited its known historic range, and was increasing despite the level of incidental mortality. However a recent assessment shows that the population may be below OSP. If this is true, general permits to allow a take of this species are in jeopardy. This is a good example of how the very limited management options available for depleted species may result in severe economic consequences even though we believe the stocks can tolerate the expected level of incidental mortality.

Hawaiian Monk Seal

The status of the Hawaiian monk seal has not changed substantially since its listing as endangered in 1976. The population was last estimated in 1985 at 1,488 animals. NMFS is implementing a recovery plan that was developed in 1983 by the Hawaiian monk seal recovery team. As recommended by the team and others, NMFS has designated several areas in the northwestern Hawaiian Islands as critical habitat. Research includes yearly counts of pups at all major breeding locations and studies of physiology, feeding habits and the effects of marine debris.

Bowhead Whales

NOAA's National Marine Mammal Laboratory has continued to fund research by the Alaska Eskimo Whaling Commission and North Slope Borough on the endangered bowhead whale. Expanded studies have resulted in a population estimate for the western Arctic stock of whales at 7,200 (plus or minus 2,400) based on both visual and acoustic survey data collected during the 1985 spring migration. The International Whaling Commission's (IWC) Scientific Committee accepted this population estimate in 1987. Although the Committee recommended that it remain a Protection Stock, it supported the continued subsistence harvest of bowheads by Alaskan natives. The U.S. aboriginal subsistence proposal of 32 strikes in 1987 and 35 strikes in 1988 was unanimously accepted by the IWC, indicating the strength of the scientific analyses leading to the current population estimate and proposed strike limits.

Right Whales

Although protected from whaling since 1931, right whale populations have shown little evidence of recovery. Fewer than 200 remain in the North Pacific, a few hundred in the North Atlantic, and about 3,000 in the Southern Hemisphere. The North Atlantic Right Whale Consortium, funded through NMFS' Northeast Fisheries Center, is continuing research on the North Atlantic stock. Research efforts are focused on the population's breeding and foraging habitat and using fluke photographs for identification and tracking of individual whales. Concerns for the right whales include entanglement in fishing gear, the effects of whale

watching, dredging, and vessel traffic particularly in the calving grounds off the southeast United States. We are working with the right whale recovery team to develop a recovery plan for North Atlantic and Pacific stocks of right whales, and expect to have an approved plan by the end of 1988.

Humpback Whale

The humpback whale population in the western north Atlantic is estimated at about 5,800 animals, with over 3,500 having been individually identified. The population in the Pacific is estimated at about 1,600. The greatest impacts on the species today occur from entanglement in fishing gear, pollutants, vessel traffic and habitat destruction. A recovery team has been appointed and is presently reviewing a draft recovery plan which addresses these concerns. A plan is expected to be adopted late this year.

California Gray Whale

Although severely depleted by whaling, the California stock of gray whale has been increasing and has recovered to near its pre-exploitation population size. The population is estimated at about 18,000 animals. Because of its recovery, we will review the status of this species and the existing threats to the population to determine whether or not it should remain listed as an endangered species.

Activities and Accomplishments

The remainder of my testimony focuses on other aspects of NOAA's marine mammal program, including some other issues and significant accomplishments.

Permit Program Review

As part of our marine mammal management program, NMFS issues and monitors permits for scientific research and public display. Currently there are over 400 active permits. Recently a number of concerns involving this program have been brought to our attention. This has prompted NMFS to review the policies, criteria and procedures we use in evaluating applications and in issuing and monitoring these permits. This review will be conducted in close consultation with the scientific community, the public display industry, environmental organizations and other interested parties. Regulatory and policy changes resulting from this review will, we hope, resolve most of the permit concerns raised.

Federal Coordination

NMFS works closely with other Federal agencies, such as the Minerals Management Service, Environmental Protection Agency and the Corps of Engineers, in their project planning to ensure that marine mammal concerns have been addressed and the requirements of the MMPA have been satisfied. We also coordinate our marine mammal programs with the Marine Mammal Commission and U.S. Fish and Wildlife Service. This March, NMFS and the Fish and Wildlife Service published proposed regulations to implement the 1986

amendment to the MMPA that allows a small take of depleted marine mammals incidental to activities other than commercial fishing. Taking can only be allowed if it will have a negligible impact on the species and regulations must be issued that include permissible methods of taking and means of minimizing impacts. We are now considering allowing six oil companies to take by harassment a small number of bowhead and gray whales incidental to oil and gas exploration activities in the Beaufort and Chukchi Seas.

Strandings

Two unusual stranding episodes recently occurred along the U.S. Atlantic Coast. The first, involving bottlenose dolphins, started in July 1987 along the coasts of New Jersey, Delaware, Maryland, and Virginia. During the fall, as the dolphin population migrated south for the winter, larger than normal numbers of strandings occurred along the coasts of the Carolinas and Georgia. Although the rate has declined markedly, strandings are still occurring, but not beyond Central Florida. To date we have documented a loss of 744 dolphins.

Pathological examinations have shown that the dolphins died from massive bacterial infections. These bacteria normally are found in these dolphins and it is questionable whether the animals would have been vulnerable to such infections unless they had been affected by disease, toxins, stress, or other factors which weaken the immune system. Although viruses have been isolated from dead

dolphins, it is not known if these were the cause of the mortalities.

The second stranding episode primarily concerned humpback whales in the vicinity of Cape Cod. Beginning in late November 1987 and ending in early February 1988, a total of 21 whales died. This included 15 humpback whales, 4 minke whales and 2 fin whales. We believe that the whales died from biotoxins ingested when feeding on large amounts of mackerel. The source of the biotoxin, which concentrates in the internal organs of fish, is unknown.

In dealing with each of these incidents, NOAA has cooperated with the Marine Mammal Commission, the Smithsonian Institution and other local, State and Federal agencies in establishing investigative response teams. The efforts of local marine aquaria, academia, and the environmental community were very important in helping NOAA respond effectively to these emergencies, and are much appreciated.

Entanglement

To address the problem of marine plastic pollution, NOAA has conducted several studies on debris and fishing gear entanglement issues. Base funding will allow for further support of related activities. NOAA has been working with Japan, Taiwan and Korea to address the proliferation of plastic in the North Pacific Ocean. The Driftnet Impact Monitoring, Assessment, and Control Act, which was enacted in December 1987, requires the United States to negotiate observer and enforcement agreements with these and other

governments pursuing high seas driftnet fisheries in the North Pacific. Steps have been initiated with the Department of State to begin these negotiations.

NOAA also recommended that the Congress support early ratification of Annex V of the International Convention for the Prevention of Pollution from Ships (MARPOL), which, with limited exceptions, prohibits the disposal into the sea of all plastics. With the U.S. accession, Annex V will enter into force internationally in 1989.

In April 1987, 30 U.S. Senators wrote to President Reagan expressing their concern over increasing amounts of plastic debris in the ocean and asked that the Administration help Congress develop a strategy to reduce problems caused by plastic in the marine environment. In response, NOAA is chairing an Interagency Marine Debris Task Force established to assess the problem and the need for research, identify potential reduction measures, and consider alternative actions to address the problem of plastic marine pollution. Reviews, studies and workshops addressing these tasks are now underway and the report of the Task Force is expected later this year.

Whale Watching

Since the late 1970's, NMFS has been concerned that marine mammals, especially the great whales, may be adversely affected by activities associated with whale watching. In November 1987, NMFS issued interim regulations governing approaching humpback whales in

Hawaiian waters. Previous guidelines addressing whale watching in Hawaiian waters were not effective in preventing these whales from being harassed. To provide better protection for all whales, NMFS will sponsor a whale watching workshop in October 1988. The workshop will bring together members of the scientific community, the environmental community, and the industry, with the purpose of reviewing available information to determine the effects of whale watching and how any adverse effects can be kept to a minimum. NOAA will use the results of this workshop to formulate a national policy and action plan. We believe this is the best way to develop a program that all parties can support.

Conclusion

Mr. Chairman, in conclusion we support reauthorizing this important wildlife conservation act at levels for the Department of Commerce of \$7,320,000 for fiscal year 1989 and at such sums as may be necessary for fiscal year 1990.

In addition, we believe that the continuing problem of marine mammal and marine user interactions is significant and warrants your attention during this reauthorization process. Unless we have more options in managing depleted species, some U.S. fisheries will not be able to continue without violating the MMPA.

I thank the Subcommittee for this opportunity to express the views of the Department, and will try to answer any questions you may have.

STATEMENT
WILLIAM W. FOX, JR., COMMISSIONER
MARINE MAMMAL COMMISSION
BEFORE THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES SUBCOMMITTEE
ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT
UNITED STATES HOUSE OF REPRESENTATIVES
10 MAY 1988

REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

Mr. Chairman and members of the Committee, my name is Bill Fox. With me are: John R. Twiss, Jr., Executive Director; Robert J. Hofman, Ph.D., Scientific Program Director; and Michael L. Gosliner, General Counsel. I understand that the Committee is interested in the tuna-porpoise issue and the question of depleted species.

First, the tuna-porpoise issue. As you know, we face a serious situation. In the early '70s, it was estimated that the domestic take of porpoise in the Eastern Tropical Pacific was over 350,000 animals per year. On average over the last five years, that level has dropped to about 17,500 animals for the U.S. fleet. Obviously, this constitutes a substantial reduction since passage of the Marine Mammal Protection Act. Unfortunately, as the numbers killed by the domestic tuna purse seine fleet have decreased, the levels of incidental kill and serious injury by the foreign fleet have increased substantially. We now have a situation where the estimated take by the foreign purse seine fleet exporting yellowfin tuna to the United States has risen to levels that have exceeded 100,000 animals in a year. We face two questions: how might we further reduce the levels of domestic

take? and, more important, how do we reduce the level of take by the international fleet.

Congress recognized the threat from the foreign fleets in 1984 and the Act was amended to require each country exporting yellowfin tuna to the United States to provide evidence that it has a regulatory program comparable to ours and that the average rate of incidental marine mammal take is comparable to that of the U.S. fleet. In March, the National Marine Fisheries Service published an interim final rule to give effect to this amendment. The effectiveness of this rule, which entered into force on April 18th, will depend upon: the rule itself; the ability of agencies within our government, the Inter-American Tropical Tuna Commission, the U.S. tuna industry, and the environmental community to convince foreign governments and fishermen to act responsibly; and how dependent each country is on U.S. markets.

The 1984 amendments to the Act required the National Marine Fisheries Service to set up a program to monitor indices of abundance and trends in the affected porpoise populations. Because of funding and logistic constraints, the Service could not start the program until July of 1986. At its meeting this past December, the Commission was advised that the Service expects to be able to complete the 5-year monitoring program as planned. Although the results of the program are extremely preliminary, we are concerned that when the analysis is completed, it will show that some affected porpoise stocks are smaller than previously

estimated and that the combined U.S. and foreign incidental take could be causing one or more stocks to decline.

Since 1981, the year that the National Marine Fisheries Service first established the annual allowable take of 20,500, the incidental take by the domestic fleet has varied from more than 20,000 to less than 10,000 animals. In 1982 and 1986, the allowable take of 20,500 was exceeded. During this same period, the number of vessels in the U.S. fleet declined by more than half.

There are a number of possible reasons for the variability in the annual take of porpoise. One is the number of problem sets in which large numbers of porpoise are killed. Problem sets can be caused by a variety of things including equipment malfunction and inexperienced crews. Other possible causes of the variation are: differences in the number of sets made on porpoise schools; variation in the number, species, and past capture history of porpoise that are caught; and variation in the amount of tuna caught per set. The variables most affecting incidental take appear to be the skill and desire of the crew, particularly the captain, to avoid killing porpoise, and the quality and maintenance of the fishing vessel and fishing gear.

In the Commission's view, the domestic porpoise take could be reduced by: (1) reinstating the 100% observer program; (2)

decertifying vessels and captains that consistently kill or injure substantially more porpoise than the average vessel and captain; and (3) providing assistance to the industry to explore any promising new technological approaches for efficiently catching tuna, while avoiding or further reducing the incidental take of porpoise.

As I noted earlier, however, incidental take by the domestic fleet is no longer the major problem. Clearly, the greatest effort needs to be focused on the foreign fleet. In this regard, the Commission believes it is critical that import regulations and such other measures be taken to: (1) attain as near to 100% observer coverage as is possible for the foreign, as well as the domestic fleet; (2) get an international observer program based upon exchange of observers rather than having nationals observe their own vessels; (3) insure conformance by the foreign fleet to the standards applicable to the U.S. fleet; (4) intensify training and education programs for foreign as well as U.S. fishermen; and (5) if performance standards are established for U.S. vessels and captains, apply those standards to foreign vessels and captains. In addition, the Commission believes it is essential to continue research to estimate the probable replacement yields of each affected stock and then to use these estimates to establish maximum allowable takes for both the international and the U.S. fleets.

Another critical issue is the impact that incidental taking in some other fisheries is having on marine mammals, particularly species and population stocks that are depleted or substantially affected by the fisheries or other human activities, and the impact that the Act's present prohibition on taking of depleted species may have on certain domestic and foreign fisheries.

While I shall be pleased to answer any questions which you may have about the "depleted" issue, we have not proposed any specific amending language pending a chance to see the agreement which we understand has been reached between various elements of the fishing industry and the environmental community over the past several weeks. They have worked hard and are to be commended.

I do hope that the concept of conservation plans will figure prominently in whatever the group produces. Some background may be useful in this regard.

The Endangered Species Act requires that recovery plans be prepared for endangered and threatened species unless, for some reason, a plan would not promote the conservation of the species. Application of the idea of recovery plans to marine mammals has been something we have pursued with a number of species.

With respect to the West Indian manatee, we insisted in the late '70s that a recovery plan and a comprehensive work plan, the

implementing mechanism for the recovery plan, be written. The plans have been invaluable in directing and coordinating Federal, state, and private efforts to address manatee related problems. The plans have proved so valuable that the Department of the Interior is now enthusiastically updating the manatee recovery and comprehensive work plans. Had it not been for the original recovery plan, progress realized to date would have been much less.

With respect to the Hawaiian monk seal, an endangered species which occurs entirely within United States waters, a similar situation existed. At the insistence of the Commission, a recovery team was appointed and a recovery plan written. Had it not been for that recovery plan and the Appropriations Committees' vigorous commitment to support of the program, the situation with monk seals would unquestionably be far worse. As it is, they may be holding their own.

For a number of years, the Commission has recommended the drafting and implementation of recovery plans for right and humpback whales. After Dr. Evans assumed leadership of the National Marine Fisheries Service, recovery teams were appointed and work has started. I am pleased to say that the Commission was able to provide the basic documentation on which these plans are being developed.

I mention these species as examples of how carefully developed plans which comprehensively address research and management issues can be of great value in efforts to restore species. Moreover, I think that, in the long run, they save money by ensuring that critical issues are defined clearly and research and management efforts are focused on these issues.

Consequently, I think that development and implementation of conservation plans, for species that are threatened, endangered, depleted, or substantially affected by human activities, should be an important part of any agreement governing the taking of depleted species.

Such plans should clearly describe the existing situation and all the various conservation issues affecting the species, population, and its habitat; and present an organized plan for research and management actions based on the analyses done.

It was with precisely this idea in mind that we did the species reports with research and management recommendations for the ten species of Alaskan marine mammals that you have before you. These reports should serve well as base documents for developing cooperative plans and agreements.

Specifically, I think that conservation plans should include:

1. an assessment of the status of the affected species or population stock and the habitat essential to its recovery and/or maintenance;
2. a description of the nature, magnitude, and causes of any known population declines or loss of essential habitat;
3. an assessment of the nature, extent, and significance of existing and potential threats to the species or population stock and the habitat essential to its recovery and/or maintenance;
4. an assessment of the impacts, if any, of the species or population stock, including assessment of the effects of any restrictions on the taking of the species or population stock, on fisheries, offshore oil and gas development, or other human activities;
5. a discussion of any critical gaps in knowledge of the vital parameters of the species or population stock, its habitat requirements and essential habitats, the threats to the species or population stock, and the effects of the species or population stock on fisheries, offshore oil and gas development, or other human activities;

6. a description of the research, management, and other measures needed to fill critical data gaps, restore or maintain the species or population stock within its optimum sustainable population range, protect essential habitats, and avoid or reduce impacts on fisheries or other human activities;
7. an assessment of the likely impacts of the proposed research and management plan on the affected species or population stock and on fisheries, offshore oil and gas development, and other human activities that could be affected by the proposed action; and
8. a description of the reporting, monitoring, and other programs that would be required to verify the predicted effects and to detect the possible unforeseen effects of any authorized taking.

Reauthorization of the Commission

With respect to the issue of reauthorization, the Commission recommends reauthorization of Title II of the Marine Mammal Protection Act at a level of \$933,000 for Fiscal Year 1989 and such sums as may be necessary for Fiscal Year 1990.

I hope this review has been helpful. Thank you for having invited us to testify.

STATEMENT OF DAVID G. BURNEY
GENERAL COUNSEL
U.S. TUNA FOUNDATION
BEFORE THE
FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT
HOUSE OF REPRESENTATIVES
May 10, 1988

Mr. Chairman and members of the Fisheries and Wildlife Conservation and the Environment, I submit this testimony with respect to the reauthorization of the Marine Mammal Protection Act (MMPA) on behalf of the entire U.S. tuna industry.

In my capacity as General Counsel to the U.S. Tuna Foundation I have represented the domestic tuna industry on matters pertaining to the MMPA since 1976. I worked closely with the staff of this Committee in 1981 and 1984, when the last substantive amendments were made to the MMPA.

Since 1984 I have represented the U.S. tuna industry in a variety of meetings scheduled by the Department of Commerce to carry out the Congressional mandate set forth in the 1984 amendments to the MMPA (P.L. 98-364). These meetings involved such subjects as the status of porpoise stocks in the Eastern Tropical Pacific (ETP) ocean, the feasibility of alternative fishing methods in the ETP ocean and the effectiveness of proposed import regulations. During this period I have also worked with the Porpoise Rescue Foundation and the Inter-American Tropical Tuna Commission (IATTC) in an effort to address matters raised by Congress during the 1984 oversight of the MMPA.

My testimony today will cover three important aspects of the 1984 MMPA amendments. They are:

The U.S. quota for marine mammals that may be taken incidental to U.S. purse seine tuna fishing operations in the ETP ocean.

The status of marine mammal population stocks in the ETP ocean, including the trends and abundance indices of these stocks since 1984.

The import regulations which require foreign purse seine fleets to lower their incidental take of marine mammals to rates comparable to that of the U.S. purse seine fleet.

Quota

In 1984 the MMPA was amended to establish for an "indefinite period", the annual quota of marine mammals that can be taken incidental to U.S. purse seine tuna fishing in the ETP ocean. The quota of 20,500 was initially established in 1981 after what has to have been the longest and most expensive administrative rulemaking procedure in the history of U.S. fisheries. Earlier quotas had been established for fixed time frames after similar administrative rulemaking procedures.

The 1984 Congressional oversight of the MMPA produced a consensus that something had to be done to eliminate the costly administrative rulemaking procedures. It was agreed that the U.S. tuna fleet was utilizing the best marine mammal safety technology and procedures that were available. It was also agreed that the incidental take of marine mammals by the U.S. tuna fleet had been reduced to levels that were commensurate with the best use of this technology and procedures.

In recommending that the quota be extended indefinitely this Committee in its report on the 1984 MMPA reauthorization stated, "The permit is being extended for several reasons, one of which is the fact that the industry has done a very commendable job of reducing porpoise mortality since the early 1970's." "... given the progress made by the tuna industry in reducing the

incidental take of porpoise, little would be gained by going through another Department of Commerce permit hearing once the current permit expires." (Senate Report #98-450, p.2, May 16, 1984)

Some opponents of the statutory quota argued that if the quota wasn't periodically "rached down" the U.S. tuna fleet would no longer have an incentive to use its best effort to minimize the incidental mortality of marine mammals. This argument was first rejected by Congress in 1981 when the MMPA was amended to permit the U.S. tuna fleet to meet the "zero mortality" goal of the Act, "by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." (P.L. 97-58, October 9, 1981)

Congress rejected this argument again in 1984 when it established the statutory quota for an "indefinite period". Not only was Congress convinced that the U.S. tuna fleet was using its best efforts to minimize the incidental take of marine mammals, they also realized that any quota would have to be flexible enough to account for the rapidly changing dynamics in the tuna fishery of the ETP ocean. Forces such as climatic conditions, interspecific dependencies, vessel logistics and political constraints can annually affect the incidental take of marine mammals by the U.S. tuna fleet.

We have been informed that some critics of the 1984 statutory quota believe that it should be reviewed because they claim there are fewer U.S. purse seine vessels currently operating in the ETP ocean than in 1984. We are told that these same parties argue that the U.S. harvest of tuna from this fishery has also decreased since 1984.

Neither of these claims is true. At the time that Congress considered the 1984 amendments to the MMPA, there were thirty-four (34) U.S. purse seine vessels certified by the Department of Commerce to participate in the subject

fishery. In 1987 there were also thirty-four (34) U.S. purse seine vessels certified to participate in this fishery.

In 1984 the certificated U.S. fleet of thirty-four (34) purse seine vessels harvested 59,400 tons of yellowfin tuna from the subject fishery. In 1987 the U.S. fleet of thirty four (34) purse seine vessels harvested 82,200 tons of yellowfin tuna from the same fishery. This substantial increase in harvest from 1984 to 1987 illustrates the dynamic nature of the ETP ocean tuna fishery.

In 1984 this Committee carefully examined what effect the permanent quota might have on future marine mammal population stocks. The Committee report on the 1984 MMPA reauthorization recommended that the Department of Commerce conduct an ongoing marine mammal population survey. The report went on to state, "This section directs the Secretary to 'take such action as is necessary' in the event that this research shows that tuna fishing is having a 'significant adverse effect' on these marine mammal stocks." Significant adverse effect was defined as, "... a situation in which the incidental take of marine mammals by the tuna industry is a direct cause of a continuing overall decline in the population of these stocks." The report then stated, "Population declines due to natural causes would not be sufficient grounds for the alteration of quotas or fishing practices." (Senate Report 98-450, p.8, May 16, 1984)

The 1984 quota was based on the assumption that the U.S. tuna fleet would continue the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. Clearly, the record of the U.S. tuna fleet in 1987 demonstrates that this is the case. With a record 95 percent of the U.S. tuna fleets fishing days observed by Federal authorities, the incidental take was documented to be 31.7 percent below the MMPA quota, the take per ton of tuna caught was .17, the

lowest in history, and the percentage of marine mammals released safely was 99.34 percent.

Status of Stocks

A major issue before Congress in its 1984 review of the MMPA was the continuing controversy over the reliability of data and assumptions used in the calculation of optimum sustainable population (OSP). Prior to 1984, administrative rulemaking procedures required a finding of OSP for each marine mammal population stock of the ETP ocean tuna fishery before quotas could be established for the U.S. tuna fleet. Finding an OSP level requires the ability to compare a current population size with a pre-exploitation population size. This proved virtually impossible for the marine mammal population stocks of the ETP ocean because of the paucity of data on these stocks in the early years of the fishery.

In 1984, after listening to the testimony of government scientists charged with the responsibility of calculating the OSP levels of marine mammal population stocks in the ETP ocean, the House Merchant Marine and Fisheries Committee reported, "... there are continuing disputes about the validity of data and assumptions used in calculations of present and historical stock size necessary under current permitting procedures." "These (sic) dispute precipitated extensive legal and administrative proceedings over the issuance of the general permit for incidental take, and it appears likely that similar disputes would again arise in the issuance of future permits." The Committee report concluded by stating, "In essence, it has become apparent that the available data base is inadequate to support the calculations necessary for this method to be an effective management tool." (House of Representatives Report #98-758, p.5, May 15, 1984)

In 1984, both the House and Senate decided that a new and better approach should be followed to determine the status of marine mammal population stocks in the ETP ocean. They therefore directed the Department of Commerce to, "undertake a scientific research program to monitor for at least 5 consecutive years and periodically as necessary thereafter, the indices of abundance and trends of marine mammal population stocks which are incidentally taken in the course of commercial purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean". (P.L. 98-364, July 17, 1984)

We understand that the Department of Commerce has not been able to meet its intended schedule for this research program. We have been advised that funding constraints and confusion over program objectives may delay completion of the initial five year program for some time. We hope that this program can be completed as we believe that data on marine mammal population trends and abundance indices are far more reliable than futile efforts to estimate present and historical population sizes.

Currently, the best estimate of the marine mammal population stock sizes in the ETP ocean tuna fishery are set forth in the November 1987, Environmental Assessment of the Modification to the Marine Mammal Regulations, published by the Department of Commerce. (See Table 3 attached hereto.) This table demonstrates that no marine mammal population stock in the ETP ocean is threatened, endangered or legally depleted. In fact, the table projects that each population stock will remain well over the illusory OSP level through 1990.

Import Regulations

The U.S. tuna industry believes that the import regulations of March 18, 1988 were long overdue. We have consistently asserted the need to examine the incidental take of marine mammals by foreign purse seine vessels operating in the ETP ocean tuna fishery. As far back as 1976 we advocated that the tuna/marine mammal issue should be approached regionally, not in isolation by the United States.

We supported the 1984 amendment to the MMPA which directed the Department of Commerce to address this matter through the promulgation of import regulations. We agreed that nations desiring to import tuna products into the United States from the ETP tuna fishery should be required to meet U.S. marine mammal safety standards. We also agreed that importing nations should offer reliable proof that their purse seine vessels which operate in the subject fishery have reduced the incidental take of marine mammals to a rate comparable to that of the U.S. tuna fleet.

After enactment of the 1984 amendment, we worked with other interested parties and the Department of Commerce to devise import regulations that would be effective in reducing the marine mammal mortality attributed to the foreign tuna vessels. We cooperated with the IATTC in efforts to encourage foreign nations with tuna vessels operating in the ETP ocean to join the IATTC tuna/porpoise interaction program.

It is encouraging that in 1987, for the first time, all of the foreign nations with active purse seine fleets in the ETP ocean tuna fishery participated in the IATTC tuna/porpoise interaction program. Equally encouraging in 1987, was the precipitous drop in the estimated incidental

take of marine mammals by foreign tuna vessels as compared to 1986.

We share the concern of other interested parties over the fact that implementation of the import regulations was delayed for such an excessive period. We recognize however, the difficulty in promulgating import regulations that will effectively reduce the incidental take of marine mammals by foreign tuna vessels, when these vessels have readily available alternative markets if they choose to ignore U.S. law.

We believe that foreign governments will, if encouraged, continue to work through the IATTC in order to meet the standards set by the March 18, 1988 import regulations. It is important that we show these nations that there is predictability and consistency in the approach that we are asking them to take. The IATTC should be consulted closely during the implementation period to insure full cooperation. If the objective is to effectively reduce the foreign incidental take of marine mammals the IATTC must be a major participant.

Summary

The U.S. tuna fleet is continuing to use its best effort to limit the incidental take of marine mammals in the ETP ocean tuna fishery. The record of the U.S. tuna fleet in 1987 is proof of this.

No marine mammal population stock of the ETP ocean has experienced a "significant adverse effect" as a result of U.S. tuna fishing in this area since enactment of the 1984 amendments to the MMPA. In fact, all population stocks are expected to increase in size through 1990.

We continue to support the need to monitor the marine mammal population trends and abundance indices in the ETP

ocean. We are certain that this is the only reliable method for determining the status of marine mammal population stocks in the future.

We support all efforts to effectively reduce the incidental take of marine mammals by foreign tuna vessels to levels that are comparable to that of the U.S. tuna fleet. We are prepared to work with this Committee, the Department of Commerce, and the IATTC to reach this objective.

The U.S. tuna fleet has experienced the loss of life and serious injury in efforts by crewmembers to minimize the incidental take of marine mammals associated with U.S. tuna fishing operations. The fleet has not circumvented U.S. marine mammal laws and regulations by transferring vessels to foreign registry, as one national television network recently claimed. (See my letter to ABC News attached.) They have remained under U.S. registry, fought for what they believed was right, and accepted the challenges that were presented to them.

Objectively viewed, the record of the U.S. tuna fleet in reducing the incidental take of marine mammals since enactment of the MMPA has been a success story. In fact, it was this record that led Congress to conclude in 1984 that foreign tuna fleets should be required to meet the same high standard set by the U.S. tuna fleet if they intended to export tuna products to the United States. We agree.

Table 3. Estimated 1979 and Future Population Levels.

Species/Stock Management Unit	Estimated 1979 Population	1979 Status ¹	Adjusted 1979 Population ³	Adjusted 1979 Status ¹	Projected 1990 Status ²
Spotted dolphin					
northern offshore	3,150,000	.63	6,115,000	.85	.92
southern offshore	638,700	.95			.93
coastal	193,200	.42	414,600	.76	.89
Spinner dolphin					
eastern	418,700	.27	918,800	.55	.71
northern whitebelly	486,600	.78			.83
southern whitebelly	264,900	.90			.90
Common dolphin					
northern tropical	216,900	.97			.94
central tropical	848,400	.89			.94
southern tropical	477,100	1.00			.99
Striped dolphin					
northern tropical	50,600	1.00			.98
central tropical	213,300	.99			1.00
southern tropical	483,000	1.00			1.00

¹ Proportion of pre-exploited stock size.

² Projected from adjusted population for northern offshore spotted, coastal spotted, and eastern spinner dolphin and from estimated 1979 population for all other populations; includes assessment for equal levels of U.S. and non-U.S. porpoise mortality; incorporates actual 1980-84 mortality; assumes 1985-89 mortality will occur in same proportion as 1979-84 mortality by species, and that total mortality will equal quota level each year 1985-89.

³ Adjusted in accordance with court directive only for northern offshore spotted, coastal spotted, and eastern spinner due to question about status of population; other populations were and continue to be healthy and adjustments were not of significance at this time.



United States Tuna Foundation

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(202) 857-0610 • Telex 981053

March 24, 1988

Mr. David Burke
Executive Vice President
ABC News
47 West 66th Street
New York, New York 10023

Dear Mr. Burke:

As General Counsel to the U.S. Tuna Foundation for the past ten years, I have represented the U.S. tuna industry on all matters pertaining to the Marine Mammal Protection Act (MMPA). I was shocked by many of the comments that were made during the course of your tuna/dolphin segment of ABC World News Tonight, March 15, 1988.

Your entire presentation appeared to be carefully structured to disparage the reputation of the U.S. tuna industry. You ignored the fact that the U.S. tuna industry has been credited with developing the technology and procedures that have led to the significant reduction in marine mammal mortalities incidental to U.S. purse seine operations. While you mentioned that the U.S. tuna fleet operates under a quota system you failed to note that the quotas were based on sound conservation principles.

You made no attempt to point out that the subject vessel in your story was of foreign registry. You erroneously implied that the scenes depicted were commonplace when you must have known that they were an extreme departure from the thousands of normal purse seine sets that have been documented over the years by U.S. and international observers.

Your most egregious error, however, was the outrageous accusation that in order to circumvent U.S. marine mammal regulations, "about seventy boats have been deliberately put under foreign registry." It is incomprehensible that you could make such a false statement.

United States Tuna Foundation

Mr. David Burke
March 24, 1988
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You compounded your error by creating the false impression that this phantom fleet of seventy boats was currently responsible for scenes such as those being depicted during the course of your program. How else can your comments be interpreted that, "They can operate beyond American control and do whatever they want to do" and, "No one knows what the actual dolphin kill is, but as it happens day by day, this is what it looks like."

No U.S. tuna vessel has transferred to foreign registry to circumvent U.S. regulations pertaining to marine mammals. To the contrary, the U.S. tuna industry has consistently maintained that foreign tuna fleets should be expected to meet the same standards as the U.S. fleet.

Congress specifically addressed this matter when it reauthorized the MMPA in 1984. It directed the Department of Commerce to promulgate regulations that would ban imports of tuna products from nations whose tuna fleets failed to reduce their incidental take of marine mammals to rates comparable to that of the U.S. fleet. In stark contrast to the false impression created by your program, the U.S. tuna fleet was used as a model for foreign tuna fleets to emulate.

Shortly after the 1984 Congressional mandate, the U.S. tuna industry and other interested parties began working with the Department of Commerce to develop effective import regulations. After numerous discussions, reviews and bureaucratic delays interim import regulations were issued on March 18, 1988.

You have done a serious injustice to the U.S. tuna industry by making false statements and then using these statements to create unfair and inflammatory inferences. The seriousness of your conduct cannot be exaggerated as can be seen by the instigative advertisement that appeared in the New York Times two days after your March 15, 1988 program (enclosed). It appears that the advertisement was carefully timed to coincide with the sensationalism of your approach to what is a complex and emotional issue.

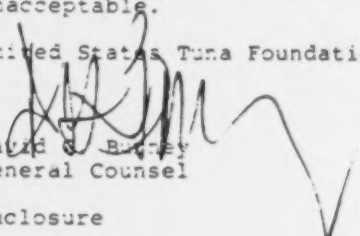
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Page 3

In a media conscious society such as ours, national television networks have an enormous power to influence public thought and perception. There is a clear abuse of this power when it is used with total disregard for fairness or accuracy. ABC World News was neither fair nor accurate in its portrayal of the U.S. tuna industry.

In the interests of honest and responsible journalism you owe the U.S. tuna industry an apology and a retraction. Anything less than this is unacceptable.

United States Tuna Foundation



David S. Burke
General Counsel

Enclosure

DCE/wb

cc: House Merchant Marine Committee Members
Senate Commerce Committee Members
Federal Communications Commission

STATEMENT OF FRANK DUNKLE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT, CONCERNING REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT.

May 10, 1988

Mr. Chairman, I appreciate the opportunity to discuss the Marine Mammal Protection Act of 1972. I will provide an overview of U.S. Fish and Wildlife Service (Service) activities concerning marine mammal conservation, management, research, and interagency coordination; information about the status of marine mammals under the jurisdiction of the Service; and Service efforts to implement recent amendments to the Act.

Overview of Service Involvement with Marine Mammals

As you are aware, the Act establishes a Federal responsibility for the conservation of marine mammals. Under the Act, the Secretary of the Interior, through the Service, is responsible for protecting and managing polar bears, marine and sea otters, walruses, dugongs, and three species of manatees. The Secretary of Commerce, through the National Marine Fisheries Service, is responsible for all other marine mammals, including whales, porpoises, seals, and sea lions.

In general, the Act establishes a moratorium on the taking and importation of marine mammals, but contains procedures for waiving this moratorium under certain circumstances. The statute exempts from the moratorium on taking Alaskan Natives who take marine mammals for subsistence or for creating and selling authentic native handicrafts and clothing as long as such taking is accomplished in a non-wasteful manner. A procedure for the transfer of

marine mammal management authority back to the States is also provided for by the Act. The Act also authorizes the Secretaries of Commerce and the Interior to allow the incidental, but not intentional, take of small numbers of marine mammals during commercial fishing operations and in association with specified activities other than commercial fishing.

Within the Department of the Interior, the U.S. Fish and Wildlife Service is responsible for managing marine mammals under its jurisdiction and for enforcing the moratorium on taking and importing marine mammals and marine mammal products. In addition to a substantial research program, the Service undertakes a number of management activities in carrying out this responsibility. Management activities required to implement the Act include evaluation and processing of requests for waivers of the moratorium and for transfer of management authority to the States, issuance of permits, population and harvest monitoring and assessment, and enforcement of provisions of the Act. The Service also advises the Department's Outer Continental Shelf Development Program and reviews measures proposed to protect marine mammals during offshore oil and gas exploration and development. Finally, the Service participates in the development of international agreements and in international activities related to marine mammals.

Service funding authorized under the Marine Mammal Protection Act for these management activities has gradually increased over the past 4 years to more than \$1,000,000 annually. During the same period, research funded under the Act's authority has increased four-fold to more than \$1,500,000 annually.

Under authority of the Endangered Species Act of 1973, the Service lists marine mammals under its jurisdiction as endangered or threatened when appropriate. Other Endangered Species Act responsibilities related to marine mammals, such

as consultations with Federal agencies as required by section 7 of that Act, are also undertaken. Service funding for marine mammals under authority of the Endangered Species Act has more than doubled in the past 6 years to more than \$1,500,000 annually.

In conducting these activities, the Service maintains a close working relationship with the Marine Mammal Commission and its Committee of Scientific Advisors, the National Marine Fisheries Service, the Minerals Management Service, and other involved Federal agencies. The Service also strives to maintain close contacts with affected States and Indian Tribes, Alaskan Native organizations, conservation organizations, and other entities regarding marine mammal issues of common interest.

Details of Service marine mammal activities are presented in the attached 1986 Annual Report submitted to the Congress earlier this year.

Status of Marine Mammals under U.S. Fish and Wildlife Service Jurisdiction

As noted in recent Service annual reports on Administration of the Marine Mammal Protection Act, there have been no significant changes in the status of species under the jurisdiction of the Service for several years. All three species of manatees, the dugong, the marine otter, and the southern sea otter are listed as endangered or threatened under the Endangered Species Act and, therefore, are considered depleted under the Marine Mammal Protection Act.

While the world population of dugongs is approximately 30,000 animals, they are widely distributed from East Africa to the South Pacific and occur as a number of isolated and vulnerable populations. The population in the Republic of Palau, a former U.S. Trust Territory in the South Pacific, appears to have remained stable at about 50 animals over the past decade. However, this remnant

population is very vulnerable and is considered the most endangered marine mammal under the jurisdiction of the Service.

The West Indian manatee, the largest stock of which is the Florida population consisting of about 1,200 animals, also remains stable. However, with both increased development and growing populations in the coastal areas of Florida and adjacent States, more conflicts between people and manatees will inevitably threaten this remaining population and habitats critical to its survival.

The southern sea otter is classified as a threatened species under the Endangered Species Act. This population, which consisted of only about 50 individuals in the 1930s, has grown to occupy more than 10 percent of its historic range and now numbers more than 1,400 animals based on recent surveys. State regulation of gillnets used in commercial fishing within the southern sea otter's range appears to have relieved a significant source of mortality so that we are cautiously optimistic that this population will continue to grow. Under special legislation enacted in 1986, efforts have been initiated to reintroduce up to 250 sea otters from this southern population to waters surrounding San Nicolas Island located about 65 miles off the coast of Southern California. Establishment of this second population is intended to implement a primary recovery action for this species and to obtain information for assessing translocation and containment techniques, population dynamics, ecological relationships in the near-shore community, and effects on the donor population.

All three marine mammal species under Service jurisdiction in Alaska are considered to be non-depleted under the Act and are currently believed to be healthy populations. However, some stocks may be adversely impacted due to unregulated harvest by Alaskan Natives for subsistence and handicraft purposes.

As you know, the Service presently lacks the authority to manage such harvests before a species or discrete stock is found to be depleted.

The Pacific walrus, the population of which is shared with the Soviet Union, numbered about 234,000 animals in 1985, an estimate based on a joint Soviet-United States population survey. This population level is probably near an historic high. However, continuation of current high levels of mortality associated with harvests in the Soviet Union and Alaska, estimated to total 10,000 to 18,000 retrieved and unretrieved animals annually, should be monitored closely, particularly if the population should begin to decline significantly.

The polar bear population in Alaska is shared with both Canada and the Soviet Union and numbers about 5,000 animals. This population is probably stable for the moment with Native take averaging approximately 100 animals annually. However, harvest of females is approaching, if it is not already at, the maximum sustainable level. In addition, the growing use of aircraft to locate polar bears on the Arctic ice pack increases the exposure of these populations to harvest.

A growing population of sea otters in Alaska, estimated to number from 100,000 to 150,000 individuals, has become reestablished in most of this species' historic range. With this population growth and range expansion have come increasing conflicts with commercial fisheries. In addition, there are indications that the taking for the purpose of creating and selling authentic Native articles of clothing has increased, which is causing concern that specific colonies may be adversely impacted.

Implementation of Recent Amendments of the Marine Mammal Protection Act

I am pleased to report that good progress has been made in implementing recent

amendments of the Act. A joint Fish and Wildlife Service/National Marine Fisheries Service proposal to modify existing regulations governing the taking of small numbers of depleted marine mammals incidental to specific activities other than commercial fishing was published in the FEDERAL REGISTER on March 15. The proposed rule would implement the 1986 amendments to the Act that authorized such incidental taking and changed the findings that must be made to allow such taking. In addition, the proposed rule would implement an amendment to the Endangered Species Act enacted in the same legislation which clarifies the relationship of incidental take approvals under both Acts. Public comment on the proposed regulations will be accepted through May 16. A final decision on the proposed rule is expected this fall.

Development of regulations to implement two earlier amendments, work on which had been suspended, has also been reinitiated. One 1981 amendment authorized the Secretary of the Interior to prescribe regulations requiring the marking and reporting of marine mammals taken by Natives residing in coastal Alaska for subsistence purposes or for creating and selling authentic Native handicrafts. Because the State of Alaska was considering seeking transfer of management authority for marine mammals, regulations to implement the marking and reporting provisions appeared to be unnecessary and their development was postponed. As the importance of the harvest and biological information that would be provided grew and the likelihood of transfer of management authority diminished, development of regulations to implement the marking and reporting provisions was initiated in 1985. A final rule will be published shortly in the FEDERAL REGISTER and will take effect 90 days after publication.

The 1981 amendments also authorized the Secretary to allow the incidental taking of small numbers of non-depleted marine mammals by citizens of the

United States while engaging in commercial fishing operations. Presently, the principal conflicts between commercial fishing and marine mammals under the jurisdiction of the U.S. Fish and Wildlife Service involve sea otters in Alaska and, to a lesser extent, Pacific walruses. As this conflict became obvious in the mid-1980s, the Service began developing procedural rules that closely parallel the policy adopted in 1983 by the National Marine Fisheries Service. Those proposed rules were published in yesterday's FEDERAL REGISTER; public comment is solicited and will be accepted through June 13, 1988.

Improving the Effectiveness of Federal Marine Mammal Programs

An array of issues regarding the Act have been discussed recently by the many management, regulatory, user, and other interest groups involved or affected. Possible solutions to these many issues range from technical corrections to clarifications that facilitate administration within the existing statutory framework or even fundamental shifts in that framework. As most of these issues address long-standing concerns for which no consensus has been achieved, one approach at this juncture would simply be to reauthorize the funding provisions of the Act. This would allow continuation of existing marine mammal programs while providing sufficient time to deliberate and reach agreement on possible solutions.

In this context, Mr. Chairman, the Service recommends that the Act's current authorization of appropriations be extended 2 years, through fiscal year 1990. Although appropriations for Service activities conducted under authority of the Act have increased recently, the current \$3 million annual authorization level should be adequate.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to answer any questions you may have.

STATEMENT ON BEHALF OF
JAPAN FISHERIES ASSOCIATION
CONCERNING THE MARINE MAMMAL PROTECTION ACT

BEFORE THE
SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
HOUSE OF REPRESENTATIVES

JUNE 1988

On behalf of the Japanese fishing industry, the Japan Fisheries Association (JFA) hereby submits this statement concerning the administration of and the amendments under consideration to the Marine Mammal Protection Act (MMPA) in conjunction with the hearing of the Subcommittee on the MMPA reauthorization held on May 10, 1988.

The JFA represents the Japanese fishing industry, including the Federation of Japan Salmon Fisheries Cooperative Associations whose permit under the MMPA was the subject of the recent Court of Appeals decision in the Kokechik case.

SUMMARY

The JFA strongly urges the United States Congress, should the Kokechik decision not be judicially reversed, to amend the MMPA so as to allow incidental take of an insignificant number of marine mammals from species that have not been included in permits issued under the MMPA in the past, without discrimination between foreign fisheries and U.S. domestic fisheries.

Above all, we expect the U.S. Government to take appropriate measures to allow the Japanese mothership salmon fishery to operate within the U.S. 200-mile zone in order to fulfill the U.S. responsibility in the international community because (1) the fishing operation of the mothership salmon fishery within the U.S. 200-mile zone is a legitimate and guaranteed right under the International Convention for the High Seas Fisheries of the North Pacific (INPFC) and (2) it is extremely difficult to believe that the salmon fishery has detrimental effects on the Northern fur seal population, judging from the best available scientific information on the population size and the actual level of incidental take.

I. AS CONSTRUED BY THE COURT OF APPEALS THE MMPA DENIES THE LEGITIMATE AND GUARANTEED FISHING OPERATION OF THE JAPANESE MOTHERSHIP SALMON FISHERY WITHIN THE U.S. 200-MILE ZONE UNDER THE INPFC.

The JFA has a grave concern about the current hardships of our mothership salmon fishery as a result of the decision of the Court of Appeals in the lawsuit regarding the marine mammal incidental take permit issued to the fishery by the U.S. Government under the MMPA. Needless to say, unless the Court's order is overturned, it will be impossible for the mothership salmon fishery to fish within the U.S. 200-mile zone in the future. Furthermore, if the population level of even one species of marine mammals which could be incidentally taken in the course of a fishery cannot be proved to be consistent with the unreasonably strict criteria of the MMPA as construed by the Court of Appeals, the fishery will not be able to continue in the U.S. zone -- even if it is well documented that the incidental take of the marine mammal species by the fishery has been minimal for years.

Recognizing the imminent necessity of avoiding such an irrational situation and absent a judicial reversal of the Court of Appeals decision, the JFA, on behalf of the whole Japanese fishing industry, would strongly request the U.S. Congress to make serious efforts to amend the MMPA appropriately. Although there is some indication also in the United States to amend the MMPA in order to allow commercial fisheries to continue, measures to be adopted should not be limited to U.S. domestic fishermen, nor discriminately applied to foreign fishermen with irrational conditions.

II. IT IS ESSENTIAL TO ALLOW THE MOTHERSHIP SALMON FISHERY TO OPERATE WITHIN THE U.S. 200-MILE ZONE IN ORDER TO MAINTAIN THE INPFC REGIME, WHICH IS VERY BENEFICIAL TO THE UNITED STATES.

1. For the conservation of North American origin salmon, we have given up the right to fish for Asian origin salmon in the waters of the North Pacific outside 200-mile zones on the condition that the Japanese mothership salmon fishery within the U.S. 200-mile zone is secured under the INPFC regime. In addition, we have been submitting detailed statistics of salmon catch to the United States and Canada. The Government of Japan has also been conducting scientific research for a long time on salmon, marine mammals and other species with a substantial number of research vessels. It should be also noted that the Government of Japan has taken

strict measures to prohibit the importation of salmon from countries fishing for salmon in the waters of the North Pacific outside the 200-mile zones in order to discourage these unregulated fisheries.

These comprehensive efforts by Japan for the conservation of North American salmon are undoubtedly beneficial to the United States.

2. With regard to marine mammals incidentally and unavoidably taken by our salmon fishery, we have been conducting such measures as recording and analysis of incidental take data, research and study to assess marine mammal populations and to collect biological information, acceptance of U.S. scientific observers on board motherships and catcherboats, and development and introduction of improved fishing gear and techniques to reduce mortality by incidental takes. The Japanese fishing industry, like the Government of Japan, has been making serious efforts in accordance with the INPFC Convention, the Japan-U.S. Memorandum of Understanding regarding marine mammals, and U.S. domestic laws. We believe that our efforts have been highly appreciated by U.S. people concerned, as evidenced by many statements which have emphasized the necessity for the United States of maintaining the INPFC regime.

3. For example, Mr. Edward E. Wolfe, the Deputy Assistant Secretary of State for Oceans and Fisheries, stated as follows on June 25, 1987, to the United States District Court for the District of Columbia.

" The conservation of North Pacific and Bering Sea fisheries, in particular salmon, and the reduction of incidental take of marine mammals pursuant to fishing activities, has been an important objective of the United States fisheries management, environmental and foreign policy for many years. It still is. The INPFC significantly furthers these interests. It protects North American salmon stocks, even when they venture well beyond the United States EEZ. It also provides the basis for obtaining scientific data on marine mammals that the United States might not otherwise be able to afford. In addition, by prohibiting salmon fishing in broad areas outside the United States EEZ (approximately 800,000 square nautical miles in the North Pacific and Bering Sea), the INPFC provides important protection to United States stocks of marine mammals that also migrate well beyond the EEZ.

The United States has had a long and mutually beneficial fishery relationship with Japan, including under the INPFC. There is a history of close cooperation between the United States and Japan in carrying out the objective of the INPFC. To this end, in 1986 the Annex to the INPFC was amended establishing new limitations on Japan's salmon fisheries operations in the North Pacific Ocean and Bering Sea in both the United States EEZ and areas outside the EEZ covered by the INPFC. If this fishery relationship with the INPFC were disrupted, it could result in North American salmon conservation schemes being irreparably damaged. It could also result in even greater losses of marine mammal than at present."

We would like to request the Congress to make every effort to secure the legitimate and guaranteed right of the Japanese mothership salmon fishery to operate within the U.S. 200-mile zone, in recognition of the critical necessity of maintaining the INPFC regime, which is extremely beneficial for the United States.

III. IN REFERENCE TO THE CURRENT ISSUE OF NORTHERN FUR SEAL INCIDENTAL TAKE, OPERATION OF THE JAPANESE MOTHERSHIP SALMON FISHING FLEET IS CONSIDERED TO HAVE NO ADVERSE EFFECT ON THE STOCKS OF NORTHERN FUR SEALS FOUND IN THE OPERATIONAL AREA IN LIGHT OF THE CURRENT LEVELS OF NORTHERN FUR SEAL POPULATIONS AND INCIDENTAL TAKE OF THIS SPECIES BY THIS FISHERY.

1. A total of 28 individuals Northern fur seals were taken incidentally for the six-year period from 1981 to 1986 (4.6 individuals / year) by the Japanese mothership salmon fleet under the annual Northern fur seal incidental take quota of 450 individuals. Of those 28 individuals, only one was recorded as dead for the five-year period from 1982 to 1986 for which live or dead status of the fur seals incidentally taken can be distinguished in the records.

2. Dr. Seiji Ohsumi, a Japanese marine mammal scientist of global fame in this field, states that only the Commander stock of Northern fur seals is susceptible to the mothership salmon fishery, and the Pribilof stock incidentally taken is minimal based on the historical information on spatiotemporal distribution of incidental take of this species in this fishery.

He also states that the Commander stock is recently within the optimum sustainable population (OSP), the population has been increasing with the 4,000 - 5,000 commercial catch annually, and the majority of animals incidentally taken by the mothership salmon fishery are young

males (in light of the location of incidental take); he concludes, therefore, that a level of take even equivalent to the past incidental quota for this species (450 individuals / year) within the 200-mile zone is unlikely to result in deterioration of the stock. (Chapter 8 of Takagi, Kenji (Editor), 1987, Comprehensive report on research on marine mammals in the North Pacific Ocean, relating to Japanese salmon driftnet fisheries, 1984-86.) (Document submitted to the Annual Meeting of the International North Pacific Fisheries Commission, Vancouver, Canada, Oct. 1987, 112p, Fisheries Agency of Japan, Tokyo, Japan.)

3. Concerning the Pribilof stock of Northern fur seals, of which incidental take in the Japanese mothership salmon fishery is considered minimal, a final rule was recently published on the Federal Register (Vol. 53, No. 96, May 18, 1988, pp. 17,888 - 17,899) announcing that the current population is below the lower boundary of OSP and, therefore, the NMFS is designating the Pribilof Island population of Northern fur seals as "depleted" under the MMPA.

However, in reference to the current stock condition of the Pribilof stock of Northern fur seals, the NMFS expressed the following view in that announcement:

" In our view this species' population of about 2 million is probably not at or near a critical level that could lead to extinction in the foreseeable future."

Furthermore, in reference to the harvest taking place on the Pribilof Islands by the Pribilovians, the NMFS mentioned the following and concluded that this level of removal of mostly young males (1,423 - 1,802 individuals / year) could not be expected to contribute to a population decline:

" Clearly, an annual harvest in the range of 1,423 (1986 harvest total) to 1,802 (1987 harvest total) mostly subadult males, or less than 0.25 percent of the stock, could not be expected to contribute to a population decline or prevent a return to high population numbers."

In addition, the NMFS's view appearing in that announcement on incidental take of Northern fur seals by commercial fisheries is as follows:

" We believe the number of fur seals incidentally killed in both foreign and domestic fisheries is less than 50 each year. At this time, based on

observer reports, incidental take in active gear of foreign or domestic fisheries in the EEZ and territorial waters does not appear to be a significant cause of mortality and is not considered a likely factor in the population decline."

These views imply that the Government of the United States endorses the fact that the effects of the Japanese mothership salmon fishery on the Pribilof stock of Northern fur seal is minimal.

In conclusion, from the viewpoint of the actual condition of incidental take of Northern fur seals by the Japanese mothership fishery and the proved insignificance of effects of the incidental take by the Japanese mothership salmon fishery on the stock of Northern fur seals, the situation where the operation of the Japanese mothership salmon fleet is not permitted while the harvest of Northern fur seals by the Pribilovians is allowed should be avoided.

IV. IF THE KOKECHIK DECISION IS NOT OVERTURNED, AN APPROPRIATE AMENDMENT TO THE MMPA IS VITAL FOR MAINTAINING A GOOD RELATION BETWEEN JAPAN AND THE UNITED STATES IN THE FIELD OF FISHERIES.

Since the beginning of the year Japan has been certified under the Packwood-Magnuson Amendment and the Pelly Amendment, notified that it would receive no allocation in the Bering Sea and Aleutian areas, and denied the right to have the mothership salmon fishery fish in the U.S. 200-mile zone by reason of the Kokechik decision. If the effect of the Kokechik decision is not overturned, either by the courts or by Congress, to allow the Japanese fishermen incidentally to take a small number of marine mammals not covered by an MMPA permit, the foundation of the fishery relation between Japan and the United States may collapse.

That is even more so since the Department of Commerce has indicated that while the rationale of the Kokechik decision will apply to the Japanese permit at least for the remainder of 1988, it will not be applied to permits of U.S. fisheries for the remainder of 1988, even though such rationale is applicable to U.S. fisheries in relation to the take of depleted species. (U.S. permits are subject to cancelation or revision to bring them into conformity with the current state of the law.) This is grossly discriminatory against Japan. The Japanese fishing industry as well as concerned members of the Japanese Diet are increasingly frustrated by such actions and are pressing the Japanese Government to make an appropriate response. For

example, the mothership salmon fishery recently requested the withdrawal from the INPFC.

In addition, failure of the United States to meet its commitments to Japan under the INPFC Convention would almost certainly result in increased political support in Japan for restrictions upon imports of U.S. fish products.

Japan is the world's largest market for seafood products and the United States is a major beneficiary of that market. The U.S. Department of Commerce estimates that Japan purchased seafood products valued at over \$1.1 billion from the U.S. in 1987 --- out of total U.S. exports of about \$1.85 billion. By contrast, Japan's exports of fish products to the United States were less than \$500 million. Thus, the United States currently enjoys a trade surplus with Japan in fisheries products of over \$600 million per year. Japan has cooperated with the United States to increase Japanese purchases of U.S. seafood still further, modifying domestic trade regulations thought by the U.S. to impede the flow of U.S. products into Japan.

As a matter of fact, most of the rapid progress of "Americanization" of the U.S. 200-mile zone off Alaska can be attributed to the growth of the Japanese market for U.S. fishery products. The U.S. Commerce Department predicts an increase in U.S. pollock exports to Japan of about \$100 million in 1988, as well as continued improvement in the terms of trade in herring.

The Department of Commerce has indicated that the ancillary effects of failure to allow the Japanese to fish within the U.S. 200-mile zone for salmon includes "loss of Japanese markets to U.S. salmon and salmon products." (Environmental Impact Statement on the Issuance of a General Permit to Allow an Incidental Take of Dall's Porpoise by the Japanese Salmon Fishery Inside the United States Exclusive Economic Zone, at 13.) This would be a very significant loss that would hit Alaska particularly hard.

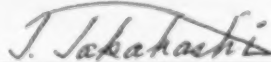
CONCLUSION

The exclusion of the Japanese salmon fishery from the U.S. zone is the result of a judicial construction of the MMPA that makes the MMPA unworkable, which has been widely acknowledged by U.S. fishing industry and environmental groups and by members of Congress.

In the process of enactment of the MMPA, it was unlikely that the U.S. Congress had an intention to invite the situation where commercial fisheries, including U.S.

domestic ones, are totally prohibited because of minimal, inevitable and unintentional incidental takes of marine mammals not covered by a permit.

The JFA, therefore, urges that in the event that the Kokeshik decision is not judicially reversed, the MMPA should be amended through the sound judgement of the U.S. Congress to allow continuation of commercial fisheries within the U.S. 200-mile zone in the future, which will contribute to sound development of the economies of both the United States and Japan in the field of fisheries.



Takenobu Takahashi
Designated Representative
Japan Fisheries Association

TESTIMONY OF CAROL FULTON
EXECUTIVE DIRECTOR
FRIENDS OF THE SEA OTTER

submitted to the

SUBCOMMITTEE ON FISHERIES
AND WILDLIFE CONSERVATION AND
THE ENVIRONMENT

COMMITTEE ON MERCHANT MARINE AND FISHERIES

UNITED STATES HOUSE OF REPRESENTATIVES

on the
Reauthorization of the
Marine Mammal Protection Act

May 31, 1988

Friends of the Sea Otter ("FSO") appreciates this opportunity to provide testimony on the reauthorization of the Marine Mammal Protection Act ("MMPA").

FSO is a non-profit conservation organization that has worked since 1968 to protect the southern sea otter (Enhydra lutris nereis) and its marine habitat along the California coast. FSO also is concerned with the protection of the Alaskan sea otter (Enhydra lutris lutris). Over 4,700 members in all 50 states and 14 foreign countries support our efforts to secure the otters' future.

The southern sea otter is listed as threatened under the Endangered Species Act ("ESA") and depleted under the MMPA. Since the mid-1980's, cooperative efforts by state and federal agencies, strongly supported by FSO and other private conservation organizations, have achieved two significant accomplishments essential to putting the southern sea otter on the road to recovery.

First, some of the problems caused by incidental take in fishing operations have been addressed. As a result of state prohibitions on the setting of entangling fishing nets throughout most of the otter range, the first small, but encouraging, signs of population growth in over a decade have become apparent.

Second, there is now a fledgling otter colony in the process of reclaiming its ancestral home at San Nicolas Island. Although the ultimate fate of that translocated colony cannot be predicted, and while the parent population of only about 1,650 animals continues to be at risk from oil spills, coastal pollution and illegal killings, we are heartened by these two developments.

From its enactment in 1972, the MMPA has been one of the otter's most important protections. Most recently, the requirements of the MMPA played a major role in the State of California's effort to protect the otter from staggering losses in the nearshore set gill and trammel net fishery. According to the California Department of Fish and Game, these losses "could be the most significant mortality factor contributing to the apparent lack of sea otter population growth in California waters during the past decade."

The MMPA also has been an important force in reintroducing the southern sea otter to San Nicolas Island, developing the zonal management concept now in place in central/southern California, implementing an observer program for incidental take, and conducting valuable scientific research.

INCIDENTAL TAKE OF DEPLETED MARINE MAMMALS

During the 1988 reauthorization process, considerable attention has been focused on the protection and management problems associated with the taking of marine mammals incidental to commercial fishing operations. The impetus behind this review, in part, has been the decision in Kokechik Fishermen's Assoc. v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988), which the National Marine Fisheries Service asserts has called into question its legal authority to issue general permits and small take authorizations for fisheries involved in the take of certain marine mammal species and stocks.

In the midst of the resulting confusion, the environmental community, including FSO, and various segments of the domestic fishing industry have consulted with each other in an effort to establish common ground and define for Congress a path that will ensure protection for marine mammals in accordance with the MMPA's time-tested purposes and policies, while providing adequate opportunity for the industry to conduct responsible fishing operations. The resulting proposal, which has been submitted to this Subcommittee, is designed to provide a limited three year exemption to the MMPA's commercial fishing incidental take prohibition and set in motion a long overdue effort to improve our ability to identify, assess, and eliminate or mitigate the adverse effects of fisheries on marine mammals.

Parties to the negotiations for the proposal have not questioned the necessity of excluding sea otters from the limited exemption. This decision is based on unassailable biological, management and legal considerations.

Any incidental take of southern sea otters could jeopardize species recovery. In all likelihood, such take would initiate a period of no population growth or decline similar to that of the mid-1970's to the mid-1980's.

The behavioral characteristics and distribution patterns of the southern sea otter make it particularly vulnerable to drowning in entangling fishing nets. Otters usually are distributed within 1/2 mile to 1 mile of shore, and they generally feed on bottom-dwelling invertebrates in waters less than 20 fathoms deep.

Before the current net bans were enacted by the California legislature, sea otters were drowning in high numbers (averaging roughly 100 animals per year) in large mesh entangling fishing nets set primarily for halibut. While these laws have reduced the number of otter drownings, they have not stopped them. For example, otters are still being caught in areas where closures have not been imposed. In addition, otters continue to drown in nets set illegally in closed areas.

Considering the staggering losses that the southern sea otter has experienced from incidental take, the negative impact of such take on the population, the natural vulnerability of the animals to net drownings, the small size of the population, and the fact that even when all taking is prohibited the otter still is suffering from illegal take, the MMPA prohibition on incidental take must be left intact for this depleted species. For the southern sea otter, any incidental take has a significant adverse effect.

Protecting southern sea otters from incidental take also is a key aspect of the ESA and MMPA recovery efforts. As early as 1980, the Marine Mammal Commission ("MMC") recommended to the U.S. Fish and Wildlife Service ("FWS") that a zonal management approach be implemented in which "zones" would be established (through translocation, if appropriate) where sea otters are secure from the threats of human activities. See Letter from Robert Eisenbud, MMC to Lynn A. Greenwalt, FWS (Dec. 2, 1980). This strategy also called for the designation of areas where otters would not be reintroduced because, among other factors, habitat is unsuitable, threats are too great, or conflicts with fisheries would be severe. FWS adopted this approach in its 1982 Southern Sea Otter Recovery Plan.

Originally intended to protect otters primarily from the threat of oil spills, zonal management assumed an added dimension in the early 1980's when it was confirmed that

incidental take in set net fisheries was having a devastating effect on the southern sea otter. As a result, it became necessary to establish zones where otters would be protected from certain kinds of fishing.

The concept of providing conflict-free zones to protect the sea otter was implemented in Public Law No. 99-625, the so-called "Sea Otter Translocation Amendment" of 1986. That legislation facilitated the recovery program by clarifying the authority under which southern sea otters could be translocated. A primary purpose of the translocation was to ensure that the entire population would not be subject to an environmental catastrophe, such as a major oil spill.

As a part of the translocation program, Congress provided for the designation of a "management zone" where otters would not be allowed to colonize, where incidental take during legal fishing operations would not be prohibited, and where specified protections of the ESA would not apply. In doing so, Public Law No. 99-625 established the basis for zonal management in central/southern California -- areas would be recognized around the translocation site and throughout the parent population range (including room for expansion) where otters would be fully protected and incidental take prohibited. In a separate area, a "no otter zone" would be established where otters would be removed by nonlethal means and fishing interests would not be subject to penalties for incidental take.

FWS implemented this program in 1987 by translocating otters from the mainland California coast to San Nicolas Island. The State of California joined in the effort by prohibiting fishing nets and the discharge of firearms around the San Nicolas Island translocation site. As a result, sea otters are fully protected north of Point Conception and around their reoccupied habitat at San Nicolas Island.

Like the proposed environmental community/fishing industry proposal, the central/southern California zonal management program is the product of extensive negotiations among all affected interest groups and state and federal agencies. Honoring the understanding reflected in Public Law No. 99-625 is another important reason southern sea otters are not included in the limited exemption set forth in the 1988 environmental community/fishing industry proposal.

Like the southern sea otter, the Alaskan sea otter has been subjected to heavy exploitation in the past and was nearly extirpated by the fur trade. However, because the Alaskan sea otter has recovered more successfully than the southern sea otter, it is not listed under the ESA. Nonetheless, as recognized in the MMC's 1988 Alaska Sea Otter species account, individual population stocks remain subject to numerous serious threats, including incidental take.

Alaskan sea otters are not included in the proposal for, unlike the other marine mammal species that are covered, they have not yet received attention in an incidental take proceeding. Though most of the other species covered by the proposed limited exemption are subject to permits and authorizations that provide restrictions designed to reduce the effects of incidental take, no such protection is available for Alaskan otters. As a result, there are no permits or authorizations to extend or protections to apply. This is a problem that FWS must come to grips with in the near future.

In addition to keeping in mind the reasons sea otters are excluded, FSO requests the Subcommittee to recognize that this proposal, like any other negotiated agreement, does not fulfill either side's desires completely. As the Subcommittee reviews the proposal, FSO urges Members to consider the following points.

First, as a matter of clarification, the proposal does not authorize fishing in areas closed under state or federal law.

Second, in establishing mechanisms for interested parties to address questions concerning the status of species or stocks, ultimate responsibility must be retained by the Secretary. Under no circumstances should a forum be established in which biological determinations become subject to negotiation or dictated by economic and political considerations.

Third, the effectiveness of the MMPA depends on penalties that have "a bite." Insufficient fines or other penalties become an inconsequential cost of fishing.

Fourth, for many years, the southern sea otter has benefited from the guidance of an ESA Recovery Plan. FSO believes that other marine mammals would benefit from having a recovery plan requirement incorporated into the MMPA. Such a plan should address recovery aspects only, and not be transformed into a multi-purpose management program designed to facilitate human activities that have adverse effects on protected marine mammals.

Finally, adequate observation, verification and reporting of incidental takes are essential. There is no excuse for anything less than full and accurate reporting and cooperation with verification efforts by all those involved in incidental take.

For many years, sea otters have been seriously affected by incidental take. FSO hopes that the lessons learned as a result of the sea otter's experience will find application in the effort to protect other marine mammals.

NATIVE TAKE

Lurking beneath the surface of the 1988 reauthorization has been the question of the proper scope of the MMPA's Alaskan Native take exemption. In recent years, FSO has paid close attention to this question.

The legitimate subsistence and handicraft uses made of marine mammals by Alaskan Natives are entitled to special protection. Although there historically has been little use of sea otters for subsistence or handicraft purposes, FSO does not oppose such takings as are consistent with the purposes of the Native take exemption and the biological objectives of the MMPA.

The question of authorized uses of sea otters for handicraft purposes has been settled by the recent decision in Katelnikoff v. Department of the Interior, 657 F. Supp. 659 (D. Alaska 1986). In that case, which FSO participated in, the court properly construed the MMPA and its legislative history to allow the taking of sea otters for handicraft purposes only for items that were customarily and traditionally produced by Alaskan Natives prior to 1972. Shortly after enactment of the MMPA, FWS attempted to identify these and other marine mammal handicraft items, but was discouraged from doing so by the Native community. The high value of otter pelts and increasing Native interest in taking otters (up from four verified takes in 1982 to 555 in 1986) has caused FWS to renew its efforts to

define legitimate handicraft uses of sea otters. FSO supports steps to address this question through administrative action.

Concern also has been expressed by FWS and others concerning the flexibility of the MMPA to deal with population declines that may be caused, or contributed to, by Native harvest. The MMPA does not allow FWS to regulate most aspects of Native take, unless the species or stock is depleted. As a general management principle, this could bring about the undesirable result of preventing FWS from taking necessary actions to prevent a marine mammal from becoming depleted. As is recognized by the Native take provisions of the ESA and the MMPA's state management requirements, such authority may be necessary to protect affected populations.

FSO believes that this issue deserves careful consideration. In the case of the Alaskan sea otter, the overall abundance of the species in Alaskan waters (100,000 - 150,000 animals) is deceptive. The MMPA's goal is to protect individual stocks and maintain them at optimum sustainable population levels. As pointed out in the MMC's 1988 Alaskan Sea Otter species account, 15 sea otter population stocks have been identified in Alaska, some in locations where Native take has been increasing rapidly. The possibility that Native harvest, either separately or combined with other kinds of take, may cause a population stock decline that cannot be controlled calls for careful consideration of the need for a

management mechanism that can respond to problems before they become serious. To this end, FSO believes it would be appropriate for the Subcommittee to direct affected agencies and interest groups to review this issue, define any problems that exist, and identify appropriate solutions that can be considered during the next MMPA reauthorization.

THE PERMIT SYSTEM

The MMPA provides limited exemptions from its taking prohibition when permits are issued for public display or scientific research. As a depleted species, the southern sea otter may be taken under permit only for scientific research. To ensure that marine mammal stocks are not adversely affected and that the well-being of individual animals is provided for, the MMPA requires public review of all permit applications and careful oversight by the MMC. FSO strongly supports this system. Our extensive experience with sea otter permits has demonstrated the need for full public review opportunities and MMC oversight before, and after, the proposed take.

Two changes have been suggested to the MMPA permit system. First, it has been suggested that authority should be available to issue emergency permits, without full public review, to preserve "unique research opportunities" or protect adversely affected stocks. FSO considers this change unnecessary and undesirable.

From our involvement in the review of sea otter research permits, we are confident that there are few, if any, valid research opportunities that are foregone by requiring permit applicants to comply with the public review process. On the other hand, recommendations frequently are produced during the mandatory public review that benefit the affected stocks, ensure humane treatment of the animals, and enhance research opportunities and techniques.

FSO is grateful for the many important advances in our understanding of sea otter biology and population dynamics that have resulted from scientific research. We believe, however, that providing researchers with discretion to take marine mammals in "unique" situations will create a loophole that is far too large for the limited benefits it could produce. Moreover, because section 109(h)(1) already provides authority to take individual marine mammals for their own protection and welfare, we do not believe that additional authority is necessary for that purpose.

Consideration also has been given to creating a new category of permits for takings that are necessary for recovery purposes, but that do not qualify as scientific research. FSO supports this proposal, provided that: (1) restrictions are imposed to ensure that such takings advance a legitimate recovery purpose, as defined in agency plans and programs; and (2) if maintenance in captivity is necessary, that the animals

and their progeny are adequately cared for and released to the wild as soon as it is feasible to do so.

Thank you for considering our views. FSO supports a strong MMPA. We look forward to working with this Subcommittee during the 1988 reauthorization, and in the future, to advance the MMPA's purposes and policies.

1778P

TESTIMONY
OF
JANIE LEASK
PRESIDENT
OF THE
ALASKA FEDERATION OF NATIVES
ON THE
REAUTHORIZATION
OF THE
MARINE MAMMAL PROTECTION ACT

May 10, 1988

Mr. Chairman, members of the subcommittee, my name is Janie Leask. I am the president of the Alaska Federation of Natives (AFN). On behalf of AFN and its member organizations I would like to express our appreciation for the opportunity to testify this afternoon in support of the reauthorization of the Marine Mammal Protection Act (MMPA).

As you know, the continued use of marine mammals for subsistence purposes and marine mammal by-products in the manufacture of traditional Native handicrafts is of critical importance to Alaska Natives living in villages along the Alaska coastline, from Kaktovik on the windswept coast of the Beaufort Sea a few miles west of the Canadian border to Hydaburg on the southern tip of the Alexander Archipelago in southeast Alaska. A recent report on Native hunting prepared at the request of the Marine Mammal Commission indicates that 59,000 Alaska Natives living in 129 coastal communities depend upon the harvest of marine mammals for their sustenance or their livelihood. See Matthew Iya, Marine Mammal Issues of Concern to Alaska Natives and Approaches That Might Be Taken to Resolve Problems (Marine Mammal Commission 1988).

For that reason, in 1972 when it enacted the MMPA and, in so doing, imposed a national moratorium on the directed take of marine mammals, Congress was careful to exempt Native hunting from the moratorium. Pursuant to section 101(b), Indians, Eskimos and Aleuts living on the coast of the North Pacific and

Arctic Oceans may take marine mammals "for subsistence purposes"¹ or "for purposes of creating and selling authentic native articles of handicrafts or clothing." In addition, section 101(b) requires Native hunting to be conducted in a nonwasteful manner.²

The conference committee that drafted section 101(b) drew the text of the Native hunting exemption from the text of the Native hunting exemption in the MMPA bill the Senate Committee on Commerce reported. See House Report No. 1488, 92d Cong., 2d Sess. at 23 (1972)(With respect to the text of section 101(b) "the conferees essentially adopted the provisions of the Senate amendment."). Prior to reporting its bill, the Commerce Committee held hearings at Nome and Bethel, Alaska, at which 95 witnesses, most of whom were Inupiat and Yup'ik Eskimo marine mammal hunters from surrounding villages, testified. See Ocean Mammal Protection: Hearings before the Subcomm. on Oceans and Atmosphere of the Senate Committee on Commerce, 92d Cong., 2d

¹As used in section 101(b), the National Marine Fisheries Service (NMFS) has defined the term "subsistence" as: "the use of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or those who depend upon the taker to provide them with such subsistence." 50 C.F.R. 216.3.

²NMFS has defined the term "wasteful manner" as: "[a] taking or method of taking which is likely to result in the killing of marine mammals beyond those needed for subsistence or for the making of authentic native articles of handicrafts and clothing or which results in the waste of a substantial portion of the marine mammal and includes, without limitation, the employment of a method of taking which is not likely to assure the capture or killing of a marine mammal, or which is not immediately followed by a reasonable effort to retrieve the marine mammal." 50 C.F.R. 216.3.

Sess., Part 2 (1972)(hereinafter "Senate Hearings"). The Committee then returned to Washington, D.C., and drafted a bill which contained what is now section 101(b). When the bill was reported, the Committee summarized the information about Native hunting it obtained during the field hearings as follows:

The findings were that most villages of northern Alaska depend upon marine mammals not only for food, clothing and implements, but utilize products from seals, whales, and walrus as the basis for their small cash economy. An Eskimo hunter may bring in a seal, which is cut up for food, pelt and seal oil. Any excess beyond family needs can be sold to neighbors or turned in at a village store for credit on gasoline, fuel oil or ammunition. Carvings and native handmade crafts, and clothing, created from marine mammals, are a continuing manifestation of ancestral cultural patterns, and must not be extinguished by act of Congress.

Senate Report No. 863, 92d Cong., 2d Sess. at 8 (1972).

Significantly, the Commerce Committee approach to the Native hunting issue was strongly supported by Alaska environmental organizations. See Senate Hearings Part II at 906-909 (statement of Ernest Mueller, president, Alaska Conservation Society), 909-915 (statement of Art Davidson, representative, Friends of the Earth). See also Senate Hearings Part I at 713 (statement of Cynthia Wentworth, Alaska Chapter, Sierra Club).

Since 1972 the section 101(b) Native hunting exemption has proven itself a workable approach that has increased marine mammal populations while affording Native people fair treatment. For the past sixteen years all directed marine mammal hunting (other than Native hunting) has been prohibited and Native hunting has been unregulated. Under this system, marine mammal

populations which, other than through the Native hunt, have not been exploited have remained healthy, and several important populations have substantially increased.

In 1972, for example, the U.S. Fish and Wildlife Service (FWS) estimated that the Pacific walrus population numbered between 90,000 and 100,000 animals. See Senate Hearings Part I at 198 (statement of E.U. Curtis Bohlen, Deputy Asst. Secretary of the Interior for Fish and Wildlife and Parks). According to a population assessment recently prepared by the Marine Mammal Commission, the most recent survey data indicate that the population presently numbers approximately 250,000 animals. See Marine Mammal Commission, Selected Marine Mammals of Alaska: Species Accounts with Research and Management Recommendations (Jack W. Lentfer ed. 1988)(hereinafter "Species Accounts").

The situation with polar bear is similar. Although reliable population estimates are not available,³ FWS has indicated that

³According to the Marine Mammal Commission:

Sound estimates of the abundance of polar bears in Alaska or trends in population levels currently do not exist. This is related to a number of factors. . . . [T]he degree to which local populations are discrete is not fully understood. In addition, the probability of sighting a bear is related to habitat type, and even under ideal sighting conditions many bears are not seen . . . At present there is no way a priori to stratify a survey to account for differences in ice type in different areas. Finally, the density of polar bears is low enough that logistic constraints generally preclude surveying at a level of effort that will provide meaningful population estimates or indices of abundance.

Species Accounts at 43.

the polar bear population is "healthy" and "probably stable," and that the population numbers approximately 5,000 animals. The sixteen year moratorium the MMPA has imposed on sport hunting has undoubtedly been a positive factor that has contributed to the health of the population and to the protection of subsistence uses of the population by the Inupiat Eskimo people of the northern arctic. In 1972 the Department of the Interior testified that:

In 1971, it is estimated that 206 polar bears were legally taken on the pack ice adjacent to Alaska. Over 90 percent of these animals were taken on the high seas. Most of these bears were harvested with the aid of aircraft which are employed to both locate and herd the animals to the hunter. This manner of hunting has been practiced for more than two decades and has accounted for the killing of approximately 4,000 polar bears during this period. Aircraft hunting has resulted in a drastic decline in the number of polar bears taken by Eskimos and has caused much alarm among conservationists.

Senate Hearings Part I at 197.

According to FWS, as the result of the moratorium imposed by the MMPA, the total polar bear harvest presently averages "approximately 100 animals annually," all of which are taken by Native subsistence hunters.

Lastly, based on aerial and boat surveys, in 1972 the Alaska Department of Fish and Game estimated the Alaska sea otter population at between 50,000 and 100,000 animals. Senate Hearings Part II at 892. Sixteen years later, FWS characterizes the otter population as "growing" and estimates the population at between 100,000 and 150,000 animals.

Interestingly, as the statistics set forth above indicate, after sixteen years of unregulated Native hunting, marine mammal species whose primary interaction with humans is with Native hunters are in good biological condition, while several species taken incidentally in the course of commercial fishing operations have exhibited significant population declines.⁴

This is not to say that the implementation of the Native hunting exemption has been without controversy. Although Native harvest practices are subject to unwritten village traditions that over the generations have evolved to ensure the maintenance of healthy marine mammal populations, from the outset FWS has been uncomfortable with the idea of "unregulated" Native hunting. To help alleviate this concern, the Native community has undertaken three actions.

First, during the 1981 reauthorization AFN supported an amendment to section 109 of the MMPA that authorizes FWS and NMFS to adopt regulations requiring Native hunters to mark, tag and report animals taken during the subsistence hunt. In 1985 (four years after it was delegated authority to do so), FWS published a notice of proposed rulemaking announcing its intent to adopt a regulation governing the marking, tagging and reporting of walrus, polar bear and sea otter. 50 Fed. Reg. 49,577. Although more than a year ago the Eskimo Walrus Commission, by resolution,

⁴In 1986, for example, NMFS published notice of its intent to declare the Pribilof Island population of North Pacific fur seals "depleted." 51 Fed. Reg. 47,155. On May 6, 1988, NMFS published notice of its intent to declare the Alaska Steller sea lion population "depleted." 53 Fed. Reg. 16,299.

urged FWS to promulgate a final regulation, for reasons best known to itself, to date it has not done so.

Second, the Native community has established organizations and developed management plans intended to advance the conservation of marine mammal species through cooperative management and self-regulation. The Eskimo Walrus Commission, which represents Native walrus hunters in 18 villages from Kaktovik to Togiak, was organized in 1978. Headquartered in Nome, on May 21, 1987, the Commission entered into a cooperative management agreement for walrus with FWS and the State of Alaska. See Attachment A. The Commission collects teeth, stomachs, reproductive tracts, muscle and blubber tissue, livers and kidneys from village hunters which FWS analyzes to obtain data on age and sex composition, food supply and heavy metal and other contamination. In addition, the Commission subcontracts with FWS to monitor the walrus harvest at Nome and King Island. Lastly, the Commission works closely with village hunters to develop, and through self-regulation implement, appropriate conservation strategies. Prior to the 1986 season, for example, the Commission requested village hunters to take special care to reduce their take of female walrus with calves. In response to the request, 25 percent fewer females were taken in 1986 than were taken in 1985.

The North Slope Borough, the municipal government whose jurisdiction encompasses the North Slope of Alaska, has been involved in a similar cooperative management and self-regulation

effort regarding polar bear. In January the Borough signed a polar bear conservation and management agreement with the Inuvialuit Game Council, an organization that represents Eskimo hunters in the Northwest Territory of Canada. See Attachment B. Section II of the agreement establishes a detailed management plan for the polar bear population that traverses the ice pack between the two countries. One of the objectives of the plan is "to provide the maximum amount of protection to female polar bears." To achieve this objective, the agreement prohibits the use of aircraft for the purpose of taking polar bear, establishes a closed season, and prohibits that taking of sows and cubs.

In addition to the involvement of Native hunters in the development and implementation of walrus and polar bear management plans, Alaska Natives are involved in other cooperative management efforts. On January 28, 1988, North Pacific Rim, the nonprofit association representing Alaska Natives who reside in the Prince William Sound region, sponsored a teleconference at which representatives from villages from Bristol Bay to southeast Alaska agreed to organize an Alaska Native Sea Otter Commission to develop a cooperative management plan for the conservation of sea otters which Native hunters will implement through self-regulation.

Lastly, AFN, the Eskimo Walrus Commission, the Alaska Beluga Whale Committee and other affected Native organizations are working with the State of Alaska to test a new approach to marine mammal management. As the subcommittee is aware, in 1981 the MMPA was amended to streamline the

procedure that enables states to apply for authority to regulate the taking of marine mammals. Since that time, the Alaska Department of Fish and Game has worked closely with residents of affected villages to determine whether the State should submit an application to regain regulatory authority. For reasons the State will undoubtedly detail in its own testimony, in March Governor Cowper decided that the State would not submit an application to regain regulatory authority over any marine mammal species. Instead, the Governor committed the State to a new approach. On March 9, 1988, Norman A. Cohen, Deputy Commissioner of Fish and Game, by letter, informed AFN that:

The state will initiate efforts to establish a system for developing comprehensive management plans for marine mammals. This process will involve the ADF&G, appropriate federal agencies, user groups, and other interested parties. The comprehensive management plans would be submitted to the Secretary of the Interior or Commerce for approval, and implemented through federal procedures or cooperative agreements.

In April, the Alaska Department of Fish and Game informed AFN that the State has identified the Pacific walrus as the marine mammal species which will be the subject of the first management plan. AFN looks forward to working with the State in this effort.

On April 8, 1988, William Horn, Assistant Secretary of the Interior for Fish and Wildlife and Parks, by letter, informed AFN that FWS did not intend to recommend that Congress consider any amendments to the MMPA this year that would affect Native hunting. See Attachment C. In anticipation that Congress might consider amendments, last October the 1987 AFN Convention

delegates, by resolution, identified amendments to the MMPA that the delegates believe will facilitate the implementation of the MMPA in Native villages. Copies of the resolutions are attached. See Attachment D. However, since FWS has not proposed amendments and the State's new approach to marine mammal management will take several years develop and implement, AFN fully supports FWS's position that no amendments be considered this year. AFN understands that the consortium of environmental organizations led by Greenpeace agrees with this recommendation.

Mr. Chairman, the MMPA is sixteen years old. Since 1972, our collective experience implementing the MMPA indicates that Congress's original policy judgment was sound. As a result of the moratorium on directed taking, marine mammal populations in Alaska (other than those that interact at sea with commercial fisheries) have substantially increased. At the same time, the Native hunting exemption has enabled the traditional way of life to continue in Native villages whose subsistence and handicraft economies are dependent upon the harvest of marine mammals. And it has done so without unnecessary, and frequently heavy handed, regulation disrupting the texture of village life, and it has done so in a manner that has encouraged Native hunters to become involved in the conservation of marine mammal populations upon which the continuation of their way of life depends. For these reasons, AFN looks forward to continuing to work with FWS, the State of Alaska and interested environmental organizations to build on the foundation of mutual interest and cooperation the MMPA has created.

MEMORANDUM OF AGREEMENT

U.S. Fish and Wildlife Service
Anchorage, Alaska

Alaska Department of Fish and Game
Juneau, Alaska

and

Eskimo Walrus Commission
Nome, Alaska

THE UNITED STATES FISH AND WILDLIFE SERVICE, THE ALASKA DEPARTMENT OF FISH AND GAME AND THE ESKIMO WALRUS COMMISSION DO MUTUALLY AGREE AND DECLARE:

That there should be open and continuous communication and exchange of information among agencies and groups interested in the health, well being, and utilization of the Pacific walrus (*Odobenus rosmarus divergens*), and that a sound management policy for this species is best implemented as the result of mutual cooperation and assistance.

THEREFORE:

The following Memorandum of Agreement (Agreement) is presented in recognition of this acknowledgment of mutual goals and understanding.

I. PURPOSE:

This Agreement is designed to assist the signatory Agencies in the management of the Pacific Walrus by forming a memorandum of agreement for the exchange of biological and management information and for support of the requirements of pertinent statutes, regulations and resolutions.

In furtherance of this purpose, the Agreement provides for:

A. cooperation among the Eskimo Walrus Commission, the Alaska Department of Fish and Game and the U.S. Fish and Wildlife Service (Service) for the sound management and utilization of the Pacific Walrus, and;

B. a vehicle by which information regarding the effective and efficient management of the walrus can be exchanged, shared, and/or made public.

AFN Attachment A

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 2

II. AUTHORITIES:

The United States Fish and Wildlife Service enters into this Agreement pursuant to the authority granted in the Marine Mammal Protection Act, 16 USC 1382 (c).

The Alaska Department of Fish and Game enters into this Agreement pursuant to the authority granted in AS 16.05.050.

The Eskimo Walrus Commission enters into this Agreement pursuant to Article I of Commission By-Laws.

III. APPLICATION TO OTHER TREATIES, CONVENTIONS OR AGREEMENTS:

A. Nothing in this Agreement shall be read to abrogate the responsibility of the U.S. Fish and Wildlife as charged under the Marine Mammal Protection Act (16 USC 1361-1407). Further, the provisions of this Agreement shall be deemed to be in addition to and not in contravention of, the provisions of any existing international treaty, convention, statute or agreement, which may otherwise apply to the Pacific walrus.

B. If anything in this Agreement shall be deemed unlawful, or contrary to the Regulations made and provided for in such case, it shall be null and void and not affect the remainder of the Agreement.

WHEREAS:

This Agreement, is developed to serve the following purposes:

1. to promote sound management and utilization of the Pacific walrus based upon scientific information by encouraging a cooperative management process in a manner consistent with the Marine Mammal Protection Act of 1972, as amended;
2. to promote the development and dissemination to the public of information and educational material concerning walrus;
3. to encourage cooperation by the U.S. Fish and Wildlife Service, the Alaska Department of Fish and Game, and the Eskimo Walrus Commission in scientific, management and enforcement programs concerning the Pacific walrus and its utilization;
4. to encourage further cooperation and exchange of information between the United States and other Nations in matters pertaining to the Pacific walrus.

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 3

NOW, THEREFORE, be it known that the Parties hereto agree as follows:

THE UNITED STATES FISH AND WILDLIFE SERVICE AGREES:

1. that it may cooperate with other agencies and persons in carrying out its responsibilities under the Marine Mammal Protection Act of 1972, as amended, as provided in 16 U.S.C. section 1371 (9) and (b), 1379 (h) and (k), and 1382 (c);
2. to manage the Pacific walrus under the requirements of the Marine Mammal Protection Act of 1972, as amended, until such time as relieved of this responsibility by law;
3. to support the development of a resource management plan through which the State of Alaska may seek a transfer of management authority consistent with requirements of the Marine Mammal Protection Act;
4. To continue to observe the Alaska Native exemption of the Marine Mammal Protection Act of 1972, as amended, as implemented by the Service's regulation at 50CFR section 18. 23;
5. To conduct scientific studies in cooperation with the Alaska Department of Fish and Game, and the Eskimo Walrus Commission, as allowed by budgetary constraints and fiscal priorities to:
 - a) determine the size and trends of the Pacific walrus population;
 - b) assess the general health, welfare, and other life history parameters of the Pacific walrus;
 - c) monitor the presence of pollutants and/or contaminants, and their effects upon walrus;
 - d) determine the distribution and migration chronology of Pacific walrus;
 - e) identify, describe and protect important breeding, calving, and feeding habitat and haul-out areas of the Pacific walrus;
 - f) assess the impact on walrus of harassment; oil, gas or other exploration or development activity; aircraft over-flights; noise pollution; and hunting;
 - g) conduct research on methods of take of Pacific walrus in order to reduce loss due to non-retrieved animals;
6. to utilize input from users of the Pacific walrus as represented by the Eskimo Walrus Commission;

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 4

7. to provide such law enforcement input and activity as necessary and possible under budgetary constraints and fiscal priorities, and to cooperate with the Eskimo Walrus Commission and designated user groups to continue compliance with the provisions of the Marine Mammal Protection Act;
8. to implement Reporting and Sealing Regulations as necessary, consistent with section 109 (i) of the Marine Mammal Protection Act of 1972, as amended, and to utilize Native monitors to the maximum extent practicable, and as permitted by budgetary constraints and fiscal priorities;
9. to prepare and disseminate educational materials regarding the Pacific Walrus, including information about pertinent scientific, management and enforcement programs;
10. to cooperate with the Eskimo Walrus Commission, Alaska Department of Fish and Game, and other parties in the development and implementation of management plans;
11. to promote and encourage further research, communication and agreements with foreign nations regarding the management, conservation and utilization of the Pacific walrus.

THE ESKIMO WALRUS COMMISSION AGREES:

1. to recognize the United States Fish and Wildlife Service as the agency with legal responsibility for the management of the Pacific Walrus under the mandate of 16 USC 1361-1407, as amended;
2. to fulfill such responsibilities assigned and accepted by all parties of this Agreement through amendment to the Agreement;
3. to cooperate by informing and educating users of the Pacific walrus regarding:
 - a) the value and necessity of their compliance with applicable statutes, laws, regulations and agreements;
 - b) the value and necessity of cooperating with efforts to obtain biological specimens;
4. to provide a method for the acquisition and transfer of traditional Native knowledge for application to biological and other studies;

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 5

5. to cooperate with the Service in the implementation of walrus Reporting and Sealing Regulations (when implemented by a final rule issued by the Department of the Interior) and to assist through information and education programs and the provision of monitors, as budgetary constraints and fiscal priorities allow;

6. to cooperate with the Service, and the Alaska Department of Fish and Game as appropriate in:

- a) the development and implementation of management plans for the Pacific walrus utilizing modern and traditional conservation ethics;
- b) the development of conservation management plans for walrus haul-out areas in Alaska;
- c) conducting scientific studies to monitor the health, status and trends of the Pacific walrus population;
- d) research on methods of take of Pacific walrus in an effort to reduce loss due to non-retrieved animals;

7. to actively encourage and promote a harvest based upon the regulations and considerations of the biological status of the walrus population, by means such as:

- a) manipulation of the age and sex composition of the harvest;
- b) maximizing utilization of the walrus and by-products thereof within the constraints of the Marine Mammal Protection Act and related legislation;
- c) improving the retrieval rate by using the most efficient, effective, and humane methods of harvest, including but not limited to the prohibition of the use of fully automatic weapons;

8. to cooperate with the Service and the Alaska Department of Fish and Game in efforts to:

- a) monitor the presence of pollutants and/or contaminants and their effects upon walrus;
- b) determine the distribution and migration chronology of Pacific walrus;
- c) identify, describe and protect important breeding, calving, and feeding habitat and haul-out areas of the Pacific walrus;
- d) assess the impact on walrus of harassment; oil and gas and other exploration or development activity; aircraft overflights; noise pollution; and hunting;

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 6

9. to cooperate in the preparation and distribution of educational materials and information concerning the Pacific walrus as a valuable natural resource;
10. to encourage village residents to make suggestions, comments or concerns to the Eskimo Walrus Commission, (P.O. Box 948, Nome, Alaska 99762).

THE ALASKA DEPARTMENT OF FISH AND GAME AGREES:

1. to recognize the United States Fish and Wildlife Service as the agency with legal responsibility for the management of the Pacific Walrus under the mandate of 16 USC 1361-1407, as amended;
2. to fulfill such responsibilities assigned and accepted by all parties of this Agreement, through amendment to this Agreement:.
3. to cooperate with the Service and the Eskimo Walrus Commission in;
 - a) conducting scientific studies to monitor the health, status and trends of the Pacific walrus population;
 - b) the development of conservation management plans for walrus haul-out areas in Alaska;
 - c) research on methods of take of Pacific walrus in an effort to reduce loss due to non-retrieved animals;
 - d) monitoring the presence of pollutants and/or contaminants and their effects upon walrus;
 - e) determining the distribution and migration chronology of Pacific walrus;
 - f) studies to identify, describe and protect important breeding, calving, and feeding habitat and haul-out areas of the Pacific walrus;
 - g) studies to assess the impact on walrus of harassment; oil, gas, or other exploration or development activity; aircraft overflights; noise pollution; and hunting;
4. to encourage local programs for voluntary compliance with applicable laws, regulations and agreements;
5. to cooperate with the Service in the implementation of walrus Reporting and Sealing regulations (when implemented by a final rule issued by the Department of the Interior) as allowed by budgetary constraints and fiscal priorities;

PACIFIC WALRUS MEMORANDUM OF AGREEMENT, PAGE 7

6. the preparation and distribution of educational materials and information concerning the Pacific walrus as a valuable natural resource;
7. encouraging village residents to make suggestions, comments or concerns to the Eskimo Walrus Commission, (P.O. Box 948, Nome, Alaska 99762).

Amendments to this agreement may be proposed at any time by submission in writing to the other affected parties, and shall become effective upon approval by the signatories hereto or their representatives.

The effective date of this agreement shall be from the date of final endorsement. The agreement shall remain in force until one of the parties signifies in writing to the others the desire to terminate its participation and obligations. The agreement shall become null and void 30 days after such notification. This agreement shall be reviewed by all signatory parties annually on the anniversary date and recommended changes be incorporated by amendment, or the agreement terminated in part or in whole.

SIGNED:

DATED:

 Regional Director
 U.S. Fish and Wildlife Service
 Anchorage, Alaska

 Commissioner
 Alaska Department of Fish and Game
 Juneau, Alaska

 Chairman
 Eskimo Walrus Commission
 Nome, Alaska

POLAR BEAR MANAGEMENT
IN THE SOUTHERN BEAUFORT SEA

AN AGREEMENT BETWEEN

INUVIALUIT GAME COUNCIL
INUVIK, N.W.T., CANADA

AND

NORTH SLOPE BOROUGH FISH AND GAME
MANAGEMENT COMMITTEE
BARROW, ALASKA, U.S.A.

JANUARY, 1988

AFN Attachment B

MANAGEMENT AGREEMENT FOR POLAR BEARS
IN THE SOUTHERN BEAUFORT SEA

PREAMBLE

The International Agreement on the Conservation of Polar Bears addressed the issue of shared populations by stating in Article VII that parties shall..."consult with other Parties on the management of migrating polar bear populations, and exchange information on research and management programmes, research results and data on bears taken.", while Article II states that parties shall..."take appropriate action to protect the ecosystems of which polar bears are a part,...".

In 1983, scientific evidence began to emerge indicating that the population of polar bears occupying the southern Beaufort Sea from about Icy Cape in Alaska, U.S.A. to Baillie Islands in the Northwest Territories, Canada, was a discrete and shared population which transcended international boundaries. Because of differences in management systems which exist in Alaska and Canada, there was a need to unify management of this important shared natural resource.

Recognizing the mutual concerns of Alaskan and Canadian users and the stated intent of the International Agreement on the Conservation of Polar Bears, the respective local user groups, North Slope Borough Fish and Game Management Committee (F&GMC) and Inuvialuit Game Council (IGC), embarked upon a coordinated management approach.

Initial polar bear management concepts were discussed along with other issues of mutual concern in a meeting at Inuvik on the Porcupine caribou herd. Those in attendance represented the North Slope Borough and the Inuvialuit Game Council. In August, 1985, representatives of IGC attended a meeting of the F&GMC in Point Barrow and outlined their concerns about current problems with management and harvesting of polar bears in the Beaufort Sea. After consideration of this information, on April 4, 1986, the F&GMC passed Resolution 86-01, Protection and Use of Polar Bears. Then on September 17, 1986, representatives from F&GMC and IGC developed and initialed a Draft Memorandum of Understanding (MOU) regarding the management of Beaufort Sea Polar Bears. The MOU specified that a Joint Commission and Technical Committee be formed and charged the Commission with developing a Management Plan for polar bears in the Beaufort Sea. The principles and objectives of the plan were specified. On November 6, 1986, by unanimous resolution, the F&GMC ratified the terms of the MOU. On March 3, 1987, members of the Joint Commission and Technical Committee were named and a preliminary draft management plan was advanced for review. After further discussion in the fall of 1987, both user groups agreed to ratify the Agreement. Resolutions adopting the draft management plan were passed by the F&GMC on October 16, 1987 and by the IGC on November 19, 1987.

In the following text, a brief overview of the current status and knowledge regarding polar bears in the Beaufort Sea is presented for background along with a description of identified management needs. That information (Section I) provides the justification and framework for the formal user's agreement between the F&GMC and IGC (Section II). The agreement sets out management objectives as defined by users of the polar bear resource and describes how those objectives are to be achieved.

SECTION 1

POPULATION STATUS

Polar bears inhabit most ice-covered seas of the northern hemisphere and are circumpolar in distribution. In the Beaufort Sea, they occur most commonly within 300 km of shore. When ice forms in the fall, polar bears that have spent the summer on drifting ice north of Alaska and western Canada move to the south. As the ice breaks up and recedes north in spring and early summer, the bears move north. They remain on the drifting pack ice through the summer. A large proportion of the pregnant females enter maternity dens on the drifting multi-year pack ice of the Beaufort Sea.

There are no physical barriers to prevent polar bears from moving across international boundaries. However, information from mark-recapture studies indicates that polar bears show a high degree of seasonal fidelity to the general area where they were originally marked. Studies of polar bears with radio collars indicate that animals move back and forth along the southern coast of the Beaufort Sea between Alaska and the mainland coast of western Canada, but not between Alaska and the rest of Canada, Greenland or Svalbard.

Recent radio tracking studies indicate considerable movement of animals within the Beaufort Sea. Polar bears radio-tagged off the coast of Alaska between Point Barrow and Barter Island were later located as far east in the Canadian Beaufort Sea as Cape Bathurst, Northwest Territories. Movements of radio-tagged bears also occurred in the opposite direction, from the Canadian Beaufort to Point Barrow. In summary, the available evidence indicates that polar bears between the vicinity of Icy Cape and Cape Bathurst constitute a single management unit. Although there is some overlap in the distribution of polar bears from the Banks Island and Amundsen Gulf population during the late winter and spring feeding period when the annual ice is most extensive, for management purposes it appears that the two populations can be treated separately.

In a recent review and analysis of the available data from multi-year mark and recapture studies conducted between 1971 and 1983 in the Alaskan and Canadian portions of the Beaufort Sea, a mean population of 1,776 animals (SE 274) was estimated. It is noted that this is only a best approximation since somewhat different methods were used to collect data in Alaska and Canada and the amount of effort varied between years and geographic areas. Estimates of the number of polar bears in the western Canadian Arctic in the late winter and spring, from both the southern Beaufort and Banks Island and Amundsen Gulf populations, ranged from 1,700 - 1,800 polar bears.

Although the data are not conclusive, it appears that the number of polar bears in Alaska in 1956 and 1984 were probably similar. However, the data also indicate that the population may have declined in the late 1950s and 1960s in response to hunting pressure. The population appears to have recovered during the late 1970s and early 1980s, and may have been stable since then. Recovery likely occurred in response to the establishment of quotas in Canada in 1968 and a sharp reduction in hunting of polar bears in Alaska brought about by the enactment of the Marine Mammal Protection Act (MMPA) in 1972.

Although the available evidence suggests that the polar bear population in the Beaufort Sea is healthy at present, it probably cannot absorb much of an increase in mortalities of females. If the estimate of about 2,000 bears in the Beaufort Sea is correct and the age structure is accurately represented by available catch data, then it is possible that as few as 56 breeding age females are recruited into the population each year. Concurrently, the estimated annual mortality is 61 breeding females. These estimates may be subject to some error. However, there clearly has been little or no excess recruitment of females to the Beaufort Sea population in recent years.

SUMMARY AND CONCLUSIONS

Radio-tracking data suggest that polar bears occupying the area between Point Barrow, Alaska, U.S.A., and Baillie Islands, Northwest Territories, Canada, are members of the same population. The available data suggest that the current number of polar bears in the Beaufort Sea is similar to the number in 1956 and likely totals about 2,000 animals. Numbers of polar bears in the Beaufort Sea apparently declined by the end of the trophy hunting period in Alaska in 1972. Analysis of the age structure of hunted bears in Alaska and Canada suggests that survival declined in both areas as a consequence of intensive hunting but that it has now recovered, likely to normal levels. Recovery of the population occurred during the mid- and late 1970s. Although the population presently appears to be healthy, it is not known if it is stable or changing.

There are several reasons for concern about the future of polar bears in the Beaufort Sea. First, estimates suggest that although the population is small, it may be approaching stability, or at least has not declined in recent years. A small population with low reproductive potential is vulnerable to natural and human-caused perturbations. Also, hydrocarbon exploration and development have facilitated increases in human numbers in coastal areas of the Beaufort Sea, and habitat is being influenced at an accelerating rate. As a result of the former, opportunities for encounters between polar bears and humans are increasing. There is potential for a change in the impact of hunting by an increasingly numerous and mobile local people, a change in the value of polar bear parts (e.g. hides, gall bladders), or development-related phenomena (such as an oil spill) to increase the human-caused mortalities of polar bears in the Beaufort Sea. Recent analyses suggest that the Beaufort Sea polar bear population can sustain little if any increase in the mortality rate of females. Despite many years of study, our detailed knowledge of polar bear population dynamics is rudimentary, but it is clear that a cautious approach to the management of polar bears would be wise.

POLAR BEAR MANAGEMENT IN THE BEAUFORT SEA

MANAGEMENT IN ALASKA

Polar bear management functions in Alaska are currently vested with the U.S. Fish and Wildlife Service under the terms of the Marine Mammal Protection Act (MMPA) of 1972. The State of Alaska may assume management of marine mammals as allowed by amendments to the Act in 1981 which streamlined the process to transfer management responsibilities. The Act specifies that in Alaska, coastal-dwelling Natives may take marine mammals for subsistence purposes or for the creation of authentic handicrafts so long as the population is not depleted and is maintained within the range of optimal sustainable population levels as defined within the MMPA. Enabling legislation requiring sealing and reporting occurred in 1981. The MMPA is scheduled for reauthorization in 1988.

The current harvest monitoring program began in November 1980. The objectives of this program were to determine the number, sex, age and chronology of the harvest. Annual recorded harvests in the area have ranged between 20 and 59 bears. The villages of Kaktovik (4.4), Nuiqsut (.9), Barrow (15.1) and Wainwright (13.6) harvested an average of 34 bears per year during the past seven years. Based upon the first five years, the male to female sex ratio of the harvest was 60:40. The approximate average age of males harvested was 5.5 years and the average age of females harvested was 8.7 years. The harvest was comprised of males four years of

age and greater (44%), females four years of age or greater (34%) and cubs (22%). Some bears in their third year of life are classified as cubs when they are independent animals. The chronology of the harvest favors fall months with 52% of the harvest occurring in October and November, while the months of March-May account for 25.5% of the take.

The sex ratio of the harvest reflects the availability of bears near coastal communities. Sport hunting is not practiced and the main products of polar bears harvested are meat for consumption and hides used for clothing and handicrafts. The sale of raw uncrafted hides is prohibited. The average polar bear harvest in Alaska has declined since passage of the MMPA. However, available evidence indicates, at least for the Beaufort Sea population, that the annual loss of females is a concern.

Under the current management regime, an unregulated number of polar bears, of any age and sex, may be taken by native hunters in Alaska, so long as the population is not found to be depleted. Currently there are no seasonal or area closures to protect pregnant females as recommended by the Agreement on the Conservation of Polar Bears. Implementation of mandatory reporting requirements appears to be imminent.

MANAGEMENT IN CANADA

In Canada, the annual harvest of polar bears is regulated by a quota system which has been in effect since 1968. Since the 1978-79 hunting season, the quota in the eastern Beaufort Sea has been 97, of which 38 are estimated to come from the shared population between the Canada-U.S. border and Baillie Islands, Northwest Territories. The Canadian settlements that harvest bears from this population, and their quotas, are: Aklavik 5; Inuvik 1; Tuktoyaktuk 26; and Paulatuk 6 (an estimated proportion of their total of 17) for a total of 38. The hunting season extends from 1 December to 31 May, bears in dens are protected, and family groups are protected until the cubs are 150 cm in straight line body length. From 1979-80 to 1982-83, age and sex information is available for 154 males and 94 females killed in the western Canadian arctic (both Southern Beaufort and Banks Island and Amundsen Gulf populations). The average ages of males and females greater than 1 year were 6.70 ± 4.66 (SD) and 6.70 ± 4.30 (SD) respectively and for males and females greater than 5 years were 8.61 ± 3.89 (SD) and 8.96 ± 3.66 (SD). The majority of the harvest was taken in the months of February through April.

In Canada, a small number of the tags allocated to the annual quota are used by Inuk hunters to guide non-resident sport hunters. This allows for a greater economic return than does the sale of the hide alone. Because not all of the guided hunters succeed in killing a polar bear, and the tags cannot be reused, in most years not all the bears in the allowable quota are taken. Since the International Agreement permits the hunting of polar bears by local people using traditional means, Canada requires that dog teams be used for transportation in the guided hunts.

FUTURE MANAGEMENT OF POLAR BEARS IN THE
SOUTHERN BEAUFORT SEA

The harvest of polar bears in the Beaufort Sea has a long history, and polar bears must be recognized as a valuable renewable resource. During the period of trophy hunting in Alaska, 75% of the polar bear harvest was comprised of males, demonstrating that a managed hunt can protect females and concentrate on males. Reducing the potential losses of females to hunting will decrease future vulnerability of the population to both natural and human-caused perturbations and allow for a sustained harvest.

There is evidence that in bear populations, large numbers of adult males may suppress survivorship of subadults. Therefore, a harvest concentrating on males may have some compensatory benefits, including the possibility of an increased take. These conclusions are based largely on the results of research done on black bears and their applicability to polar bears is not clear. These conclusions are worth investigation, since recent studies suggest that a population of polar bears can sustain a harvest of no more than 1.5% to 2% of the adult females per year and that as few as 56 females may be recruited into the Beaufort Sea population each year.

Polar bears have long been a high profile species which capture the imagination of the public. Because of public and user groups attention and concern for the welfare of polar bear populations and the fact that polar bear populations grow relatively slowly, management of this important resource must be conservative. It is clear that the most important segment of the population is the adult female component.

Because of the mutual concerns for the future of Beaufort Sea polar bears outlined above, the user groups in Canada and Alaska initiated a cooperative effort to unify management of the resource. Management concepts to be incorporated in the plan are in some cases more stringent than in the MMPA, although they are consistent with the terms of the International Agreement. In other instances, such as the exchange of meat and by-products, the relaxation of export provisions allowing shipment from Canada into the USA and the sale of polar bear hides and by-products by the traditional users of Alaska, the management concepts are inconsistent with those of the MMPA under Federal management. The intent of the drafters is to develop a management plan which provides protection for the habitat and the polar bear resource and equity in user opportunities for the Beaufort Sea area in full recognition that requirements of existing legislation in both the United States and Canada take legal precedent. The drafters are hopeful that future legislative amendments may allow greater flexibility in regulating managed uses of polar bears.

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MANAGEMENT AGREEMENT FOR POLAR BEARS IN THE SOUTHERN BEAUFORT SEASECTION II

AGREEMENT BETWEEN:

THE INUVIALUIT GAME COUNCIL
OF INUVIK, NWT, CANADA .

AND

THE NORTH SLOPE BOROUGH FISH AND GAME MANAGEMENT COMMITTEE
OF BARROW, ALASKA, USA.

The Inuvialuit of Canada and the Inupiat of the United States

NOTING that both groups have traditionally harvested a portion of polar bears from the same population in the southern Beaufort Sea; and,

NOTING that the continued hunting of polar bears is essential to maintain the dietary, cultural and economic base of the groups; and,

NOTING that the maintenance of a sustained harvest for traditional users in perpetuity requires that the number of polar bears taken annually not exceed the productivity of the population; and,

NOTING that the International Agreement on the Conservation of Polar Bears makes provision for cooperation in the research and management of shared populations; and,

NOTING that nothing in this Agreement shall be read to abrogate the responsibilities of Federal, Provincial or State authorities under existing or future statutes; and,

NOTING that the Inuvialuit and the Inupiat will have a long-term fundamental influence on the maintenance and use of this resource and that the efforts of other parties will also be required to ensure effective conservation;

HAVE AGREED AS FOLLOWS:

ARTICLE I

Definitions

- a) The species considered in this Agreement is the polar bear (Ursus maritimus).
- b) The area covered by this Agreement is the southern Beaufort Sea from approximately Baillie Islands, Canada, in the east to Icy Cape, USA in the west.
- c) The people covered by this Agreement are the Inuvialuit of Canada and the Inupiat of the North Slope of Alaska.
- d) The settlements whose hunting practices may be affected by this Agreement are Barrow, Nuiqsut, Wainwright, Utqasuk and Kaktovik in the United States and Inuvik, Aklavik, Tuktoyaktuk and Paulatuk in Canada.
- e) Sustained yield is a level of taking which does not exceed recruitment and is consistent with population ranges determined to be optimal and sustainable.
- f) The Joint Commission shall consist of two (2) representatives designated by each of the Inuvialuit Game Council and the North Slope Borough Fish and Game Management Committee. The Technical Advisory Committee shall be appointed by the Joint Commission.

ARTICLE II

Objectives

- a) To maintain a healthy viable population of polar bears in the southern Beaufort Sea in perpetuity.
- b) To provide the maximum amount of protection to female polar bears.
- c) To minimize detrimental effects of human activities, especially industrial activities, on important polar bear habitat.
- d) To manage polar bears on a sustained yield basis in accordance with all the best information available.
- e) To encourage the collection of adequate technical information on a timely basis to facilitate management decisions.
- f) To further refine the eastern and western boundaries of the population of polar bears.
- g) To encourage the wise use of polar bear products and by-products within the context of management on a sustained yield basis.

- h) To facilitate the exchange of polar bear meat and products between traditional users in Alaska and Canada (Enabling legislation required).
- i) To legalize the sale of polar bear hides and by-products by the traditional Alaskan users in Alaska (Enabling legislation required).
- j) To facilitate the export of polar bear hides and other polar bear products from the Western Arctic of Canada into the USA (Enabling legislation required).
- k) To consider at a later date a limited legalized Alaskan sport harvest of polar bears which emphasizes benefits to local hunters of the area (Enabling legislation required for Federal management).

ARTICLE III

Regulations

To conserve this population of polar bears, the Inuvialuit and the Inupiat have agreed as follows:

- a) All bears in dens or constructing dens are protected.
- b) Family groups made up of females and cubs-of-the-year or yearlings are protected. The birthdate of cubs is fixed at January 1 and cubs less than five feet (152 cm.) in straight line body length are protected.
- c) The hunting season shall extend from December 1 to May 31 in Canada and from September 1 to May 31 in Alaska.
- d) The annual sustainable harvest shall be determined by the Technical Advisory Committee in consultation with the Joint Commission and shall be divided between Canada and Alaska according to annual review of scientific evidence. Allocation agreements shall be negotiated and ratified prior to September 1 annually. Each signatory to this Agreement shall determine for itself the distribution of the harvest within its jurisdiction.
- e) These regulations do not preclude either party from unilaterally introducing additional conservation practices within their own jurisdictions.
- f) Any readjustment of the boundaries pursuant to the above may necessitate a readjustment of user allocations under the management plan.
- g) The use of aircraft or large motorized vessels for the purpose of taking polar bears shall be prohibited.
- h) Each jurisdiction shall prohibit the exportation from, the importation and delivery into, and traffic within, its territory of polar bears or any part or product thereof taken in violation of this Agreement.
- i) Polar bears in villages during closed seasons should be deterred from the area.
- j) Polar bears threatening human safety or property may be taken at any time of the year and may be counted against the village allocation as ascribed by the Joint Commission.

ARTICLE IV

Collection of Data and Sharing of Information

- a) The following data will be recorded for each bear killed: sex, date and location of kill, and hunter's name.
- b) The following shall be collected from each bear killed: an undamaged post-canine tooth, ear tags or lip tatoos if the tags are missing, other specimens as agreed to by the hunters of either jurisdiction for additional studies.
- c) A summary of all harvest information from each jurisdiction shall be exchanged annually.
- d) The number of collars deployed for research purposes shall be limited to the minimum number necessary to provide accurate population information.

ARTICLE V

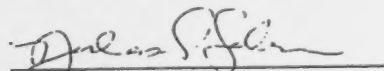
Duration of Agreement

- a) This Agreement shall enter into force when it has been signed by the representatives of both parties.
- b) This Agreement shall remain in force unless either Contracting Party requests it be terminated.
- c) Amendments to the Agreement may be proposed by either signatory and accepted or rejected by mutual agreement after consultation with the membership of the Inuvialuit Game Council and the North Slope Borough Fish and Game Management Committee.

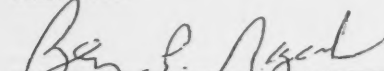
The Alaskan signatories of this document have no authority, to bind and do not purport to bind the North Slope Borough to any agreement which would otherwise be in violation of the exclusive federal treaty power established by the United States Constitution, but are acting solely as representatives of the local traditional user group of the polar bear resource in furthering the consultation, management, and information exchange goals of the International Agreement on the Conservation of Polar Bears.

SIGNED on this the 29th day of January, 1988 in the Town of Inuvik, Northwest Territories.

On behalf of
the North Slope Inupiat

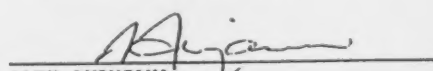


NOLAN SOLOMON
Chairman
North Slope Borough
Fish and Game Management
Committee.

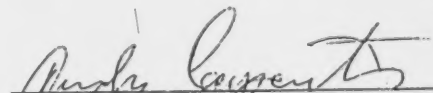


BENJAMIN P. NAGEAK
Director
Department of Wildlife Management

On behalf of the
Inuvialuit Game Council



ALEX AVIUGANA
Chairman
Inuvialuit Game Council



ANDY CARPENTER
Vice-Chairman
Wildlife Management Advisory
Council (N.W.T.)



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 08 1988

Ms. Janie Leask
President, Alaska Federation
of Natives, Incorporated
411 West 4th Avenue, Suite 301
Anchorage, Alaska 99501

Dear Ms. Leask:

In my January 26, 1988, letter to you, I indicated that a final decision had not been made on an internal, interim position regarding possible amendments to the Marine Mammal Protection Act (Act). This is to inform you that the Fish and Wildlife Service will not recommend technical amendments to the Act this year. Funding reauthorization will be sought to allow continuation of management, law enforcement, and research efforts.

I am hopeful that an atmosphere of trust and close cooperation will continue between us for the long-term benefit of marine mammals in Alaska and the Native peoples for which healthy marine mammal populations are so important. If I can be of further assistance, please let me know.

Sincerely,

/Sgt/ BW

Assistant Secretary for Fish
and Wildlife and Parks

AFN Attachment C

ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-36

TITLE: MARINE MAMMAL PROTECTION ACT

WHEREAS, coastal villages in the State of Alaska are very concerned about the proposal by the regional office of the U.S. Fish and Wildlife Service to request Congress to amend the Marine Mammal Protection Act to allow the U.S. Fish and Wildlife Service to regulate Native subsistence hunting; and

WHEREAS, residents of the aforementioned coastal villages discussed the Reauthorization of the Marine Mammal Protection Act at length and in depth at the AFN/RuralCap/Eskimo Walrus Commission Workshop held on October 21, 1987 and determined that protecting the Native subsistence hunting exemption in the Marine Mammal Protection Act is of critical importance to all Alaska Natives.

NOW THEREFORE BE IT RESOLVED that the Board of Directors of the Alaska Federation of Natives shall:

1. Establish the protection of the Native subsistence hunting exemption in the Marine Mammal Protection Act as an AFN priority during 1988.
2. Represent, and take all appropriate action to protect the interests of, Alaska Natives during the 1988 Reauthorization of the Marine Mammal Protection Act.
3. Appoint a Steering Committee to advise the Alaska Federation of Natives staff during the Reauthorization process, such Steering Committee to be composed of knowledgeable members of the Native community, including representatives of the Alaska Eskimo Whaling Commission, the Eskimo Walrus Commission, Nunam Kitlutsisti, the United Villages of Nelson Island, the Rural Alaska Resources Association and other interested organizations.



AFN Attachment D

ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-38

TITLE: MARINE MAMMAL RESOLUTION

- WHEREAS, the Eskimo Walrus Commission is formed of walrus hunting communities of Alaska since 1978 to deal with marine mammals and their well-being, which is linked to our survival and our livelihood; and
- WHEREAS, the Marine Mammal Protection Act of 1972, as amended, is subject to reauthorization in 1988; and
- WHEREAS, said Act contains the "Native exemption" in harvesting marine mammals; and
- WHEREAS, certain animal rights groups are attempting to eliminate the "Native exemption"; and
- WHEREAS, the U.S. Fish & Wildlife Service is attempting to propose regulatory authority over Native take of marine mammals; and
- WHEREAS, the Alaska Federation of Natives is the political and corporate entity for the majority of Alaskan Natives and is recognized by Congress.

NOW THEREFORE BE IT RESOLVED by the assembled delegates of Alaska Federation of Natives that the reauthorization of the Marine Mammal Protection Act and its "Native exemption" be a high priority of Alaska Federation of Natives activities, along with the opposition to the proposed regulatory authority over Native take of marine mammals by the U.S. Fish and Wildlife Service, during the upcoming year.

CONVENTION ACTION: PASSED



ALASKA FEDERATION OF NATIVES INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-37

TITLE: MARINE MAMMALS

WHEREAS, restrictions which the Marine Mammal Protection Act imposes on the customary and traditional uses of the non-edible by-products of marine mammals taken for subsistence purposes has resulted in the waste of marine mammal by-products including, but not limited to, by-products of Northern fur seals harvested for subsistence purposes by the Aleut people of the Pribilof Islands; and

WHEREAS, the customary and traditional use of Northern fur seals by the Aleut people of the Pribilof Islands includes the use of Northern fur seal by-products in trade and commerce.

NOW THEREFORE BE IT RESOLVED that the Alaska Federation of Natives should work with the Aleut people of the Pribilof Islands, their representatives and other Native groups to request Congress to amend the Marine Mammal Protection Act during the 1988 reauthorization process to enable by-products of Northern fur seals and other marine mammals excluding sea otters taken for subsistence purposes to be utilized in trade and commerce.

CONVENTION ACTION: PASSED



ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-39

TITLE: A RESOLUTION PERTAINING TO TRADITIONAL MARINE MAMMAL
RESOURCES

WHEREAS, the Native peoples of Alaska have survived through the centuries by their traditional dependence on marine mammals for clothing, shoes, cultural dances, dolls and gifts of exchange; and

WHEREAS, in their desire to progress with the mainstream of American life, the Native peoples of Alaska have changed with time and circumstances and have denied themselves and, in turn, have denied through regulation, the use of this resource as a means of subsistence and economic self-sufficiency; and

WHEREAS, contrary to the sacrifices of Native Americans, all peoples of the world including the President of the United States have changed their traditional ways of life as time has passed without drastic sacrifice of their traditional means of economic survival; and

WHEREAS, this federal policy of denial of traditional resource utilization is unjust and economically inequitable since the policy of the Administration is also to promote self-sufficiency among Native peoples of the United states.

NOW THEREFORE BE IT RESOLVED by the delegates to the 1987 annual convention of the Alaska Federation of Natives, Inc. that a formal request be made to investigate the possibility of amending certain provisions of the regulations which relate to the Marine Mammal Protection Act to allow Native peoples to alter the skins and other parts of traditionally harvested marine mammals for uses which more nearly represent the best and most economical use of such mammals as such use pertains to the present day economic realities and way of life of the Native peoples of Alaska.

CONVENTION ACTION: PASSED



ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-40

TITLE: REGIONAL RESOURCE MANAGEMENT COMMISSION RECOMMENDATION

WHEREAS, the Regional Resource Management Commission is the subsistence and natural resources management commission for the Chugach Native Region; and

WHEREAS, certain species of marine mammals have been and continue to be an important part of the subsistence food supply and subsistence economy in the Chugach Native Region; and

WHEREAS, the Congress of the United States, recognizing the importance of marine mammals to the Alaska Native economy included a section in the Marine Mammal Protection Act of 1972 protecting the Native right to continued unregulated traditional use of marine mammals as long as the species used were not depleted; and

WHEREAS, there is inadequate knowledge of the ecology and population dynamics of some species of marine mammals; and

WHEREAS, determinations of whether or not a species is depleted are or could be based on inadequate data; and

WHEREAS, it is possible for a regulating agency to declare a marine mammal population depleted when that population may not be depleted and thereby depriving subsistence users of a resource.

NOW THEREFORE BE IT RESOLVED by the delegates at the 1987 AFN annual convention that the Regional Resource Management Commission goes on record as being opposed to the current definition of "depleted species" in the MMPA; and

IT IT FURTHER RESOLVED that a more comprehensive database must be developed using both biological and user group knowledge and input in determining a species depleted.

IT IS FURTHER RESOLVED that the Regional Resource Management Commission requests the Alaska Federation of Natives to include this in its recommendations to the U.S. Congress at the hearings for the reauthorization of the Marine Mammal Protection Act.



CONVENTION ACTION: PASSED

ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-41

TITLE: SEA OTTERS

- WHEREAS, certain species of marine mammals have been and continue to be an important part of the subsistence food supply and subsistence economy in rural Alaska; and
- WHEREAS, the Congress of the United States, recognizing the importance of marine mammals to the Alaska Native economy included a section in the Marine Mammal Protection Act of 1972 protecting the Native right to continue unregulated traditional use of marine mammals; and
- WHEREAS, the villages recognize the need for prudent use and management of marine mammals; and
- WHEREAS, the villages under their inherent authority as either traditional village councils or IRA governments desire to establish regulations governing the use and management of sea otter, a marine mammal species; and
- WHEREAS, a sea otter commission with authority to regulate sea otter take has not yet been established; and
- WHEREAS, the Alaska Federation of Natives is a state and federally recognized political entity advocating for Alaska Native rights.
- NOW THEREFORE BE IT RESOLVED by the delegates to the 1987 AFN annual convention that they support village regulation of sea otter until such time as a sea otter commission is established.

CONVENTION ACTION: PASSED



**Committee
for
Humane
Legislation**

*The Committee is the
legislative arm of
Friends of Animals
conducting public
action to protect
animals.*

STATEMENT OF THE COMMITTEE FOR HUMANE LEGISLATION

FOR THE HEARING RECORD

ON H.R. 4189

APPROPRIATIONS TO CARRY OUT
THE MARINE MAMMAL PROTECTION ACT OF 1972
AUTHORIZATION

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION
AND THE ENVIRONMENT

MAY 10, 1988

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Mr. Chairman and members of the Subcommittee, on behalf of Friends of Animals 102,000 members I would like to submit the following statement regarding the Marine Mammal Protection Act (MMPA).

SUBSISTENCE HARVESTS

The exemption for subsistence harvests of marine mammals by Native Alaskans under the Marine Mammal Protection Act is one that, in some instances, provides a major loophole to the protection of marine mammals. In the absence of an adequate definition of subsistence many abuses are allowed to occur. One species which has suffered greatly through the years and continues to because of the lack of a proper definition of subsistence is the northern fur seal.

The northern fur seal is a "depleted" species. There is a documented population crash which has witnessed a decline from 1.3 million just eight years ago to 800,000 today. The fur seal population continues to decline at the rate of approximately 62,500 seals per year. Additional legal protection needs to be provided by classifying the species as "threatened" under the Endangered Species Act, and by proposing an Appendix II listing under the Convention on International Trade in Endangered Species. Despite the grave situation of the fur seal Alaskan Natives, their Congressional representatives and the Department of Commerce, the government agency charged with their stewardship, are working for an amendment to the MMPA to allow the commercial sale of fur seal pelts.

Opposition to the Commercial Sale of Fur Seal Pelts

A resolution passed by the Alaskan Federation of Natives calls for an amendment to the MMPA to allow the commercial sale of fur seal pelts taken during the Aleut "subsistence harvest" on the Pribilof Islands. Friends of Animals is adamantly opposed to any such amendment for the following reasons:

1. We agree with the NMFS Alaska Regional Office which stated: "...such a change to the act [to allow the commercial sale of pelts taken during the "subsistence harvest"] would be completely unenforceable and would soon lead to wholesale killing of marine mammals for purely commercial reasons."
2. The commercial trade in fur seal pelts was the greatest factor in the collapse of the fur seal population and current depleted status.
3. The commercial sale of fur seal pelts would not be for traditional handicraft purposes as required under the Act. In fact there are no native handicrafts produced by the Aleut natives on either St. George or St. Paul Islands.
4. Allowing the commercial sale of the pelts from the so-called "subsistence harvest" would be in direct conflict with the intent of the MMPA to protect marine mammals and would most likely lead to other native groups seeking similar amendments which would undermine the integrity of the MMPA and do untold harm to the marine mammal species involved.

5. If a commercial sale were to be allowed there would be inflated estimates for the numbers of fur seals needed for "subsistence" purposes.

6. If the Aleuts were to depend on the sale of fur seal pelts for their financial livelihood they would not be able to survive. The EEC ban on the sale of harp seal pelts has caused a collapse in the world market for seal pelts in general. There would be no market for the pelts.

7. What the Aleuts need is a full time viable industry, which simply can not be fur seals.

8. The fur seal population continues to decline. The causes include entanglement in lost & discarded fishing gear which is a cause that will continue to kill fur seals for many, many years to come. The fur seal population is too fragile to ever be exploited again.

Definition of Subsistence

The definition of subsistence under the MMPA needs to be defined to prohibit corporations from conducting the killing. The definition should allow only those natives with no other commercial, agricultural or other natural source of food, clothing, shelter, heating or transportation available to them and whose general life practices show strict adherence to native, primitive ways of life to kill marine mammals for "subsistence" purposes. In addition, the "subsistence harvests" need to be more adequately regulated not simply once a species

is listed as depleted or when the taking is done in a "wasteful" manner.

1. Corporations should not be allowed to conduct "subsistence harvests." The Aleut's "subsistence harvest" on the Island of St. Paul is conducted by the for-profit Tanadgusix (TDX) corporation. TDX is the company that conducted the commercial slaughter of fur seals for the U.S. before the fur seal treaty was not ratified by Congress. TDX was incorporated for one purpose and one purpose only -- to kill fur seals for commercial gain. There is supposedly no commercial fur seal kill allowed under the MMPA nor should there be.

Yet, during the 1987 seal kill TDX budgeted and spent \$50,000 to pay for "professional" hunters to kill the seals. The Aleut's claim to be worried about going hungry for the winter as the justification for requesting extensions to their current fur seal "subsistence harvest." One must seriously question the rationale behind spending \$50,000, \$25,000 of which was spent to process and stockpile fur seal pelts which can not legally be sold or traded under the MMPA. The \$50,000 could be spent on food from the centrally located grocery store on the island.

3,400 fur seal pelts from the 1985 "subsistence harvest" were confiscated by federal agents at the Fouke fur company. The pelts were traced to TDX. This constitutes a gross disregard of the MMPA. Furthermore, any argument by TDX that it didn't understand the law, or that it had no intent to violate the law, seems dubious given St. Paul's and St. George's longstanding

interest and sophisticated participation in the international and domestic policies concerning the North Pacific Fur Seal.

2. The killing of marine mammals, especially those of depleted species, should not be allowed for "subsistence" purposes when other sources, either commercial or natural, of food, clothing, shelter, heating, or transportation are available to the taker.

Friends of Animals must take exception with the use of the term "subsistence" in connection with the annual slaughter of fur seals by the Aleuts on the islands of St. Paul and St. George in the Pribilof Islands. We are not convinced that Aleut survival or cultural integrity actually depends on this slaughter.

The Bering Sea is on the doorstep of St. Paul, containing 80% of the world's bottom fish - free of charge. In addition to the ample supply of fish there is a centrally located, generously stocked grocery store which according to the manager carries "everything safeway has." 2,500 pounds of red meats, poultry and fish are sold to the Aleuts weekly.

The desire to kill the fur seal has nothing to do with "subsistence needs" in this instance and is not appropriate or justified since the seals are not a food staple or anywhere near a "means of survival" and are in fact shunned for clothing.

The Aleuts in recent years have enjoyed the very substantial federal largess of nearly one million tax dollars for each of the approximately 150 residential households on the Pribilof Islands. This includes the federal monies associated with the Alaska

Native Claims Settlement Act, the Indian Claims Commission Settlement, the Fur Seal Act of 1983, the Commerce Islands Program, and various harbor appropriations, school construction, retirement fund benefits, and other allocations. In addition, \$3.9 million has been appropriated for the 489 residents of St. Paul for 1989 from a trust fund created for the Aleuts. With subsidies of this nature, the concept of "subsistence" should be moot.

3. The MMPA needs to be amended to allow for the regulation of the "subsistence harvest" before a species is listed as depleted and regardless of whether the take is done in a wasteful manner. Of the species regulated by the Fish and Wildlife Service both the walrus and polar bear populations are facing serious decline. Currently the "subsistence harvest" of both species is unregulated.

NOAA INCOMPETENCE

The National Marine Fisheries Service's (NMFS, an agency of NOAA) management of fur seals reeks of political cronyism and many decisions seem to be based on politics rather than science. Outlined below are a few of the more egregious of NMFS's actions.

1. Apparent encouragement of the commercial sale of fur seal pelts by the Aleut's. James Douglas, Jr., the Deputy Assistant Administrator for Fisheries of NOAA stated in his testimony before the Senate Committee on Commerce, Science and

Transportation on April 13, 1988 that, "Changes to the Native subsistence provisions of the Act [to allow the commercial sale of fur seal pelts] would be acceptable to NOAA if the take remained truly for subsistence and if it could be adequately enforced." This apparent endorsement is so inappropriate that Robert McVey of the Alaska Region office of NMFS sent a memo to Mr. Douglas expressing his concern that the "Alaska Region was not consulted during preparation of NMFS testimony on reauthorization of the [MMPA]." Mr. McVey goes on to state in the memo that, "We feel strongly, that in practical terms it will be impossible for us to determine whether kills occurring in remote areas are being made for subsistence purposes or merely to provide skins for sale. Thus, such a change to the act would be completely unenforceable and would soon lead to wholesale killing of marine mammals for purely commercial reasons."

NOAA's office of General Counsel went so far as to offer the return of illegally traded pelts from the 1985 "subsistence harvest" if the Aleut's obtain an amendment to the MMPA by January 1989 to allow for the commercial sale of fur seal pelts. In a settlement agreement in which the Tanadgusix (TDX) Company was fined \$5,000 NOAA offered to transfer the 3,400 pelts to TDX if the MMPA was amended by January 1, 1989.

NOAA's endorsement of the sale of the fur seal pelts is completely at odds with their mandate of stewardship over the fur seals and well beyond their authority. It is amazing that they

never bothered to discuss this matter with the Alaska Regional office.

2. Hold up of depletion designation for northern fur seals.

Friends of Animals is of the opinion that the National Marine Fisheries Service presented a credible, reasonable and scientifically justifiable case in proposing the north pacific fur seal as "depleted" within the context of the MMPA. In March of 1985 when NMFS issued the results of its Status Review of the North Pacific Fur Seal they concluded that the northern fur seal was "depleted" within the context of the MMPA. In July of 1985 NMFS again acknowledged the depleted status of the northern fur seal when it issued an Emergency Interim Rule to govern "subsistence" killing of the seals by the Aleuts.

Despite the overwhelming evidence that the fur seals were depleted NMFS reopened the comment period on the depletion ruling. This decision was based on information received from the Northwest and Alaska Fisheries Center, NMFS, Seattle office. This new information included a study conducted by Dr. E.L. Venrick which NMFS inappropriately used as "evidence" of a change in carrying capacity of the Bering Sea.

The Venrick study could in no way prove anything about the Bering Sea because it studied conditions thousands of miles away in the Central Pacific. In Dr. Venrick's own words, "[M]y coauthors and I are in agreement that extrapolation of our results into the Bering Sea, as NMFS has done, is completely unjustified." It should be apparent to anyone with even a

modicum of scientific background that the putative scientific justification for reopening the comment period on the northern fur seal depletion designation based on the Venrick study was without merit. This, then suggests that factors other than a scientific determination were indeed behind the delaying stratagem.

Friends of Animals is of the opinion that the reasons were more political than scientific and would therefore be beyond the legal limits of the MMPA under which the depletion designation is nondiscretionary. Based on NMFS data it was adequately shown that the fur seals are below OSP and therefore legally depleted under the MMPA.

The actions of NOAA and NMFS should not be allowed to go unnoticed by Congress. Such flagrant disregard for the MMPA and the protection of marine mammals under the agencies' jurisdiction can simply not be tolerated.

CONCLUSION

1. The MMPA should not be amended to allow for the commercial sale of fur seal pelts.
2. The MMPA needs to be amended to include a realistic definition of "subsistence harvest."
3. The MMPA needs to be amended to require the regulation of "subsistence harvests" of non-depleted species.
4. NOAA and NMFS have been derelict in their stewardship of fur seals this should not go unnoticed by Congress.

TESTIMONY
OR
JONAH TOKEINNA
CHAIRMAN
OF THE
ESKIMO WALRUS COMMISSION
ON THE
REAUTHORIZATION
OF THE
MARINE MAMMAL PROTECTION ACT
May 24, 1988

MR CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, MY NAME IS JONAH TOKEINNA. I AM THE CHAIRMAN OF THE ESKIMO WALRUS COMMISSION. THANK YOU FOR THIS OPPORTUNITY TO TESTIFY BEFORE THIS COMMITTEE IN SUPPORT OF THE REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT. WE SUPPORT THE TESTIMONY PRESENTED BY JANIE LEASK, PRESIDENT OF ALASKA FEDERATION OF NATIVES. WE WOULD LIKE TO GIVE YOU AN INSIGHT AS TO WHAT IS HAPPENING IN ALASKA IN REFERENCE TO THE MARINE MAMMAL PROTECTION ACT AND HOW SINCE 1972, SECTION 101 (b) NATIVE HUNTING EXEMPTION HAS PROVEN ITSELF A WORKABLE APPROACH THAT HAS INCREASED MARINE MAMMAL POPULATIONS WHILE AFFORDING NATIVE PEOPLE FAIR TREATMENT. FOR THE PAST SIXTEEN YEARS, ALL DIRECTED MARINE MAMMAL HUNTING (OTHER THAN NATIVE HUNTING) HAS BEEN PROHIBITED AND NATIVE HUNTING HAS BEEN UNREGULATED. UNDER THIS SYSTEM, MARINE MAMMAL POPULATIONS WHICH, OTHER THAN THROUGH THE NATIVE HUNT, HAVE NOT BEEN EXPLOITED, HAVE REMAINED HEALTHY, AND SEVERAL IMPORTANT POPULATIONS HAVE SUBSTANTIALLY INCREASED.

THE ESKIMO WALRUS COMMISSION IS COMPOSED OF 18 WALRUS HUNTING COMMUNITIES OF ALASKA RANGING FROM GARRON IN THE NORTH SLOPE BOROUGH REGION THRU TOGIAK IN THE BRISTOL BAY REGION FOR THE FOLLOWING PURPOSES; 1) TO ENCOURAGE SELF-REGULATION OF WALRUS HUNTING AND MANAGEMENT OF WALRUS STOCK BY ALASKA NATIVES WHO USE AND NEED WALRUS TO SURVIVE, 2) TO PROVIDE EDUCATION AND INFORMATION TO THE PUBLIC, 3) TO ASSURE UTILIZATION OF WALRUS, INCLUDING MARKETING OF IVORY AND OTHER BY-PRODUCTS, CONSIDERATION OF STORAGE ALTERNATIVES

AND POSSIBLE INCREASED UTILIZATION OF WALRUS MEAT AND OTHER PARTS, TO ENCOURAGE AND PROMOTE THE USE OF WALRUS THROUGH SEEKING BETTER FOOD PRESERVATION METHODS, AND ECONOMIC USES OF PARTS WHICH MAY OTHERWISE BE DISCARDED, 4) TO REPRESENT THE WALRUS HUNTING COMMUNITIES IN REVIEWING AND COMMENTING ON REGULATORY CHANGES OR RESOURCE DEVELOPMENT WHICH MAY AFFECT WALRUS, INCLUDING COASTAL ZONE MANAGEMENT PROGRAMS, OUTER CONTINENTAL SHELF DEVELOPMENT, CLAM HARVESTING, FISHERIES, ETCETERA, 5) TO INVOLVE WALRUS HUNTERS AND USERS OF WALRUS PRODUCTS IN DECISIONS AFFECTING THE WALRUS POPULATION, 6) TO BE INVOLVED IN SCIENTIFIC, BIOLOGICAL, AND OTHER RESEARCH PROGRAMS, AND 7) TO ENCOURAGE THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO COOPERATE WITH OTHER NATIONS IN STUDIES, ENFORCEMENT, AND OTHER INVOLVEMENT IN MARINE MAMMAL MANAGEMENT.

LAST YEAR, THE ESKIMO WALRUS COMMISSION SIGNED A MEMORANDUM OF AGREEMENT WITH THE UNITED STATES FISH AND WILDLIFE SERVICE AND THE ALASKA DEPARTMENT OF FISH AND GAME TO 1) TO PROMOTE SOUND MANAGEMENT AND UTILIZATION OF THE PACIFIC WALRUS BASED UPON SCIENTIFIC INFORMATION BY ENCOURAGING A COOPERATIVE MANAGEMENT PROCESS IN A MANNER CONSISTENT WITH THE MARINE MAMMAL PROTECTION ACT OF 1972, AS AMENDED, 2) TO PROMOTE THE DEVELOPMENT AND DISSEMINATION TO THE PUBLIC OF INFORMATION AND EDUCATIONAL MATERIAL CONCERNING WALRUS, 3) TO ENCOURAGE COOPERATION BY THE UNITED STATES FISH AND WILDLIFE SERVICE, THE ALASKA DEPARTMENT OF FISH AND GAME, AND THE ESKIMO WALRUS COMMISSION IN

SCIENTIFIC MANAGEMENT AND ENFORCEMENT PROGRAMS CONCERNING THE PACIFIC WALRUS AND ITS UTILIZATION, AND 4) TO ENCOURAGE FURTHER COOPERATION AND EXCHANGE OF INFORMATION BETWEEN THE UNITED STATES AND OTHER NATIONS IN MATTERS PERTAINING TO THE PACIFIC WALRUS.

THE PACIFIC WALRUS TECHNICAL COMMITTEE (PWTC) PROVIDES BIOLOGICAL AND ECOLOGICAL RECOMMENDATION TO THE ESKIMO WALRUS COMMISSION. PWTC MEMBERSHIP IS MADE UP BY TWO MEMBERS EACH BY THE ESKIMO WALRUS COMMISSION, THE UNITED STATES FISH AND WILDLIFE SERVICE, AND THE ALASKA DEPARTMENT OF FISH AND GAME, IS PLANNING TO MEET IN JUNE 1988 TO SET UP A PLAN TEAM TO DEVELOP A WALRUS MANAGEMENT PLAN. THIS TEAM WILL INCLUDE AGENCY REPRESENTATIVES, TECHNICAL EXPERTS, USERS, AND OTHER APPROPRIATE PERSONS. SOME OF THE ITEMS THAT WE WILL BE DISCUSSING WILL BE TO 1) DETERMINE THE SIZE AND TRENDS OF THE PACIFIC WALRUS POPULATION, 2) ASSESS THE GENERAL HEALTH, WELFARE, AND OTHER LIFE HISTORY PARAMETERS OF THE PACIFIC WALRUS, 3) MONITOR THE PRESENCE OF POLLUTANTS AND/OR CONTAMINANTS, AND THEIR EFFECTS UPON WALRUS, 4) DETERMINE THE DISTRIBUTION AND MIGRATION ORPHOLOGY OF PACIFIC WALRUS, 5) IDENTIFY, DESCRIBE AND PROTECT IMPORTANT BREEDING, CALVING, AND FEEDING HABITAT AND RAISING AREAS OF THE PACIFIC WALRUS, 6) ASSESS THE IMPACT OF WALRUS UP HARASSMENT; OIL, GAS OR OTHER EXPLORATION OR DEVELOPMENT ACTIVITY; AIRCRAFT OVERFLIGHTS; NOISE POLLUTION; AND HUNTING, 7) CONDUCT RESEARCH ON REPRODUCTION OF PACIFIC WALRUS IN ORDER TO PERMIT USE OF IT IN RETRIEVED ANIMALS.

AS YOU KNOW, THE NETHERLANDS PROPOSED TO LIST WALRUS ON APPENDIX II OF THE CONVENTION OF INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FLORA AND FAUNA (CITES) TO THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES LAST SUMMER. THAT PROPOSAL WAS NOT ACCEPTED BY THE DELEGATION BECAUSE ONE OF THE REASONING IS THAT THE PACIFIC WALRUS HAS INCREASED FROM 90,000 IN 1960'S TO 234,070 IN THE LAST SURVEY AT 1985. AS I STATED ABOVE, WE DO HAVE A COOPERATIVE AGREEMENT WITH THE SERVICE AND THE STATE. OUR GOVERNMENTAL DELEGATION STATED THAT THEY WILL ENCOURAGE EVEN MORE UTILIZATION OF THE ANIMALS LEGALLY HARVESTED. AS YOU KNOW, THE ACT IS VERY RESTRICTIVE AS TO WHAT WE CAN DO WITH THE BY-PRODUCTS. WE CAN SELL CONSUMABLE MEATS IN ALASKAN VILLAGES AND TOWNS BUT YET, WE CANNOT SELL EXCESS MEATS THAT ARE TOO TOUGH TO EAT AS DOG FOOD, WHICH IS A TRADITIONAL AND CULTURAL USAGE. AND FINALLY, OUR GOVERNMENTAL DELEGATION STATED THAT THEY HAVE GOOD REASON TO BELIEVE THAT THERE IS NO SIGNIFICANT ILLEGAL INTERNATIONAL TRADE AND THE SPECIES WOULD NOT BENEFIT FROM LISTING UNDER CITES. IN THIS HARSH NORTHERN ENVIRONMENT OTHERS CANNOT UNDERTAKE A HARVEST EXPEDITION FROM LAND WITH KNOWLEDGE OF ESKIMOS OR INUITS IN THE VILLAGES INVOLVED IN HARVESTING WALRUS. REMOVAL OF TUSKS FROM DEAD WALRUS WASHED UP ON SHORE MIGHT BE COLLECTED BY OTHERS BUT EVEN IF TRADE IN THESE TUSKS OCCURRED, ITS PREVENTION OF THIS TRADE WOULD NOT EFFECT THE LIVING POPULATION.

THE UNITED STATE FISH AND WILDLIFE SERVICE WILL BE

COMING OUT WITH TAGGING AND SEALING REGULATION TO BE IMPLEMENTED THIS SUMMER FOR WALRUS, SEA OTTERS AND POLAR BEARS. WE INTEND TO PARTICIPATE WITH THIS PROGRAM AS WE HAD COOPERATED WITH THEM OVER THE YEARS.

THE LAW ENFORCEMENT HAS WRITTEN US A POLICY LETTER TO FOLLOW THIS SPRING, AS THEY HAD DONE OVER THE YEARS AND THEY STATED THAT THEY HAVE RECEIVED EXCELLENT COOPERATION WITH THE HUNTERS AND THAT THEY, AS WELL AS OURSELVES AS USERS, WOULD LIKE TO SEE THIS EXCELLENT COOPERATION CONTINUE. THEY DO GO TO THE VILLAGES AND CONDUCT PUBLIC MEETING EVERY SPRING WITH THE HUNTERS, EXPLAINING THE PROVISIONS OF THE MARINE MAMMAL PROTECTION ACT AND SPOT CHECK ON THE HUNTERS WHEN THE HUNTERS ARE RETURNING INTO THE VILLAGES.

THE ALASKA ESKIMO WHALING COMMISSION HAVE AN AGREEMENT WITH THE NATIONAL MARINE FISHERY SERVICE FOR MANAGEMENT OF THE BOWHEAD WHALE. THIS IS ONE OF THE OUTSTANDING AGREEMENT THAT ADVOCATE SELF-GOVERNING REGULATIONS OF THE USER GROUP ON THE MANAGEMENT OF THE BOWHEAD WHALES. I BELIEVE THAT SUCH AGREEMENTS WILL BENEFIT THE MARINE MAMMALS AS WELL AS THE USER GROUPS NEEDS. THE UNITED STATES FISH AND WILDLIFE SERVICE HAVE AN AGREEMENT WITH THE ALASKAN NATIVE LEADERS OF THE YUKON-KUSKOKWIM DELTA TO WORK TOGETHER FOR THE PROTECTION OF FOUR SPECIES OF THE ARCTIC NESTING GEESE. THE OVERALL RESULT, AGAIN, IS VERY POSITIVE FOR THE SPECIES AND THE NATIVE PEOPLE.

WE HAVE CONCLUDED SEVERAL MEETINGS TO CREATE AN ALASKAN BELUKHA WHALE COMMITTEE. MADE UP OF THE NATIVE GROUPS, THE

NATIONAL MARINE FISHERY SERVICE, THE STATE OF ALASKA, AND VARIOUS BELUKHA WHALE EXPERTS. THE ALASKA BELUKHA WHALE COMMITTEE HAS FORMED TO 1) DEVELOP AN EFFECTIVE BELUKHA WHALE MANAGEMENT PLAN IN CONSULTATION WITH SUBSISTENCE HUNTERS AND THE APPROPRIATE GOVERNMENTAL AGENCIES, 2) PROMOTE HUNTING EDUCATION TO IMPROVE HUNTING TECHNIQUES AND REDUCE THE NUMBER OF STRUCK AND LOST ANIMALS, 3) ADVOCATE THE NEEDED RESEARCH TO BE DONE, 4) COMPILE STATEWIDE HARVEST RECORDS, 5) IDENTIFY AND PROTECT CRITICAL BELUKHA WHALE HABITAT, AND 6) PROVIDE A STATEWIDE, NATIONAL, AND INTERNATIONAL CONTACT POINT FOR INFORMATION EXCHANGE. WE ARE PARTICIPATING WITH THIS COMMITTEE.

THE NORTH PACIFIC RIM VILLAGES HAVE FORMED THE SEA OTTER COMMISSION THAT WILL HAVE SIMILAR OBJECTIVES AS MENTIONED ABOVE. THE NORTH SLOPE BOROUGH FISH AND GAME MANAGEMENT AND THE INUVIALUIT GAME COUNCIL OF CANADA HAVE REACHED AN AGREEMENT FOR THE SOUND CONSERVATION AND MANAGEMENT OF POLAR BEARS IN THE BEAUFORT AND CHUKCHI SEA AREA. ONE OF THE OBJECTIVES OF THE PLAN IS "TO PROVIDE THE MAXIMUM AMOUNT OF PROTECTION TO FEMALE POLAR BEARS."

IN CONCLUSION, I BELIEVE THAT THE FEDERAL GOVERNMENT SHOULD TRUST THE NATIVE PEOPLE TO MANAGE MARINE MAMMALS OR COME WITH A COOPERATIVE AGREEMENT WITH THE APPROPRIATE GOVERNMENTAL ORGANIZATIONS TO MANAGE MARINE MAMMALS. WE SHOULD LOOK AT THE SUCCESS OF ORGANIZATIONS LIKE THE ALASKA ESKIMO WHALING COMMISSION. OUR VILLAGES HAVE THE HIGHEST UNEMPLOYMENT IN THE COUNTRY AND THE ACT OVER-RESTRICTS WHAT

WE CAN DO WITH THE BY-PRODUCTS, WHICH CREATE EXTREME
HARDSHIP FOR US. MARINE MAMMALS ARE OUR ONLY NATURAL
RESOURCES THAT THE NATIVE PEOPLE UTILIZE FOR FOOD AND
CREATION OF HANDICRAFTS. IN THE MAJORITY OF THE VILLAGES,
CREATION OF ARTS AND CRAFTS IS THE SOLE SOURCES OF INCOME
FOR THE NATIVE PEOPLE. WE ARE HOPING THAT YOU COULD
INVESTIGATE THE POSSIBILITY OF AMENDING CERTAIN PROVISIONS
OF THE REGULATIONS WHICH RELATE TO THE MARINE MAMMAL
PROTECTION ACT TO ALLOW NATIVE PEOPLES TO ALTER THE SKINS
AND OTHER PARTS OF TRADITIONALLY HARVESTED MARINE MAMMALS
FOR USES WHICH MORE NEARLY REPRESENT THE BEST AND ECONOMICAL
USE OF SUCH MAMMALS AS SUCH PERTAINS TO THE PRESENT DAY
ECONOMIC REALITIES AND THE WAY OF LIFE OF THE NATIVE PEOPLE
OF ALASKA. WE ARE CONCERNED ABOUT THE WELL BEING AND
CONSERVATION OF THE MARINE MAMMALS AS OUR USES OF THE MARINE
MAMMALS. AS I STATED ABOVE, IS ONE OF OUR ONLY WAY OF LIFE.
AT THIS TIME WE ARE ASKING THE STATE OF ALASKA TO CREATE A
WALRUS SANCTUARY AT CAPE SENIAVEN TO PROTECT THE SUMMERING
MALE WALRUS AND THE BIRD ROOKERY. WE ENJOY UTILIZING MARINE
MAMMALS AND WE WANT OUR CHILDREN AND OUR FUTURE GENERATION
TO COME, TO BE ABLE TO UTILIZE THEM ALWAYS.



International Association of Fish and Wildlife Agencies

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STATEMENT OF THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES CONCERNING REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT, HR 4189 FOR HOUSE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT MAY 10, 1988

by

Gordon C. Robertson, Legislative Counsel

The International Association of Fish and Wildlife Agencies, founded in 1902, is a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces and federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in the promotion of the principles of sound resource management and the strengthening of federal, state and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

The development of the Marine Mammal Protection Act (MMPA) in 1972 represents a significant step ever by the U.S. Congress to recognize an important wildlife resource and provide for its long-term conservation. The MMPA has resulted in a number of important successes in marine mammal protection. Populations of species such as California sea lions, northern elephant seals, and harbor seals have increased greatly. As much as the Association acknowledges the importance of marine mammal conservation, the Association is also aware of resource conflict that currently cannot be adequately addressed under the MMPA. The MMPA does not provide for integrated management of marine mammals with other living resources in the marine environment, and with man.

The Pacific Marine Fisheries Commission (PMFC), an affiliate member of IAFWA, prepared for this year's reauthorization by examining the issue of marine mammals/fishery interactions and proposing modifications to MMPA that would result in a more integrated and rational approach to the management of marine mammals, marine fishes and fisheries. (See Report on Proposed Amendments to the Marine Mammal Protection Act, PMFC, December 1, 1987.) The PMFC report identified the need for (a) governmental authority to lethally take nuisance animals at government facilities even when the animals are "depleted"; (b) the take of "depleted" mammals by commercial fishermen; (c) reinvolvement by coastal states in mammal management via cooperative state/federal programs; and

¹Under the Act "depleted" by no means necessarily suggests the population is actually threatened and, in fact, a population whose status is unknown is treated as if it is depleted.

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(d) funding for research and management. The intent of these recommendations is to build on earlier amendments (such as the 1981 recognition of the need for "small takes" by commercial fishing operations and the 1986 change which allows the take of depleted species (by industries other than fishing) toward the goal of establishing a regional decision-making process whereby government, fishing, environmental, oil and gas, and other users of living marine resources (including marine mammals) can rationally sustain the populations, as well as sustain both the non-consumptive and the consumptive uses.

The Association's Marine and Estuarine Committee has already endorsed the philosophy and recommendations of PMFC. We have also reviewed the May 10, 1988 document entitled "Recommended Changes from the Conservation Community and the Fishing Industry." Our review indicates the agreement will not lead to greater latitude in managing the marine ecosystem.

- * It does not address the practical need to regain state involvement in day-to-day programs for marine mammals.
- * It does not assure government control of nuisance animals when their populations are "depleted", a management tool that government has for other wildlife.
- * It does not allow the intentional lethal take of marine mammals by fishermen (to protect their gear and catch) when the mammal population is decreasing or its status is unknown, even though the take may have no adverse impact on the population, yet the mammal's impact on the fisherman's business may be significant.
- * It does not accept the data from the long-standing foreign observer program in Alaska, so it requires major expenditures of federal dollars to reverify what are known to be insignificant takes of mammals in EEZ fisheries.
- * It does not address if a fishery impact is adversely affecting a mammal stock but instead subjects all fisheries with a "continuous, documented" take to the requirements of the special exemption. The real issue is whether or not the fishery interaction has a significant impact on the mammal resources. Nothing in the proposal suggests criteria or a process to determine on a fishery-by-fishery basis whether fishery interactions are actually impacting the viability of the mammal stocks. In this instance, minimal taking in any fishery is not valid criterion for mitigation or fishery control.

There are sufficient differences between foreign and domestic fishing operations to support the need for a domestic fishery observer program with verification as only one aspect. The program should be directed and implemented by the National Marine Fisheries Service and use specially trained observers to gather information needed to design and implement necessary research on fishery/marine mammal interactions.

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On behalf of the proposal, it does require NMFS to prepare recovery plans which should better direct research programs to critical areas. It also addresses the need for better reporting by fishermen as well as an education program. The federal government has a responsibility for working with industry to implement these programs. Most importantly, it does allow most fishing to continue in the face of interactions with "depleted" species, although a five-year exemption is more realistic than only three years.

In conclusion, the Association strongly identifies with the need to move the MMPA toward an integrated management of marine mammals with other living marine resources and the uses of these resources by man. The recent proposal by the environmental community and representatives of the fishing industry appears to be a stop gap measure that will put undue burden on some segments of industry, use up significant fiscal resources, and, at the end of three years, provide no better indication of how regional management of fishery resources can be meshed with rational management of marine mammals.

IAFWA encourages a more comprehensive approach to marine mammal management and welcomes the opportunity to work with Congress on addressing the needs of the marine environment and all its users.

STATEMENT OF CHARLES A. HUGHLETT, PRESIDENT
NATIONAL WILDLIFE REFUGE ASSOCIATION

FOR THE HEARING RECORD ON

H.R. 4189, APPROPRIATIONS TO CARRY OUT THE
MARINE MAMMAL PROTECTION ACT OF 1972--AUTHORIZATION

SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION AND THE ENVIRONMENT
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WASHINGTON D.C.

MAY 16, 1988

Mr. Chairman and members of the Subcommittee, I am Charles A. Hughlett, President of the National Wildlife Refuge Association (NWRA). On the behalf of the NWRA, I appreciate this opportunity to support enactment of H.R. 4189. The Association's primary concern is the management of walrus, sea otters, and polar bears, the three marine mammals under the jurisdiction of the U.S. Fish and Wildlife Service, and important species of the Alaska Maritime and Arctic National Wildlife Refuges. Indeed, the near extinction of sea otters led to the establishment the Aleutian Island National Wildlife Refuge in 1913. The subsequent recovery of this species represents one of conservation's most important successes, as with protection afforded by the refuge, the population expanded from fewer than 500 animals in 1913 to more than 130,000 today.

On the basis of our familiarity with the National Wildlife Refuge System and a review of research reports, status, and management needs for the three species, we urge the Subcommittee to amend the Act to give the U.S. Fish and Wildlife Service authority to regulate the take of these mammals. As the Subcommittee is aware, the Service currently does not have authority to regulate hunting by Alaska Natives until the species is declared depleted. Such a declaration can be made only after lengthy administrative proceedings, and potential administrative appeals and litigation. Delay in implementing needed measures to manage these species until they are depleted almost certainly assures that such depletion will occur. Management programs should focus on maintaining healthy populations. Providing protection only after a species is depleted is contrary to sound management, and is particularly inappropriate on National Wildlife Refuges, or for species for which the United States has international responsibility.

Although populations of walrus, sea otters and polar bears are now healthy, the results of studies by the Fish and Wildlife Service and the Alaska Department of Fish and Game indicate serious management issues that need to be addressed:

Hunting by Alaska Natives results in a disproportionate harvest of females, which is now believed to be near the maximum allowable for the maintaining the population. The only important denning area in Alaska is on the Arctic

National Wildlife Refuge and denning success of females may be affected by the development of potential petroleum resources in that area.

An increase in the harvest of sea otters has occurred in some areas, inhibiting their continued recovery. In other areas, there is substantial and growing conflict with expanding populations of otters and maintenance of important recreational and commercial crab and clam fisheries. Flexible management programs are needed to protect both resources.

Harvest of walrus, primarily for their ivory, has now reached 10-18,000 animals each year, biologist predict that if this level of take is continued or increases, a significant reduction in the population is will occur. A critical situation may develop very rapidly, for as the population declines, a larger proportion of the population will be harvested each year.

In urging the Subcommittee to provide the Fish and Wildlife Service with the authority it needs for sound management of these three species we are not recommending a change in the present Native exemption to the moratorium on harvests. We believe that our suggestions will lead to increased State-Federal-Native cooperation for ensuring their continued welfare of these species. Maintaining healthy, well managed populations will benefit all users.

Thank you for considering our recommendations.

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 9, 1988

The Honorable Gerry E. Studds
Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
House Merchant Marine and Fisheries Committee
H2-543 House Office Building, Annex II
Washington, DC 20515

Dear Mr. Chairman:

I am writing to present the views of the State of Alaska regarding reauthorization of the Marine Mammal Protection Act. The conservation and management of marine mammals has been and remains an issue of significant interest to the State of Alaska and its residents. The waters off Alaska's coasts contain an unrivaled diversity and abundance of whales, dolphins, walruses, seals, sea lions, sea otters, and polar bears. These mammals constitute an international resource of great importance to the nation, and to the residents of Alaska in particular. Alaskans relate to these animals in a variety of esthetic, cultural, and physical ways, and changes in marine mammal populations or their management have direct and significant consequences for Alaskans.

Alaska's Role in Marine Mammal Management

Before Congress passed the Marine Mammal Protection Act (MMPA) in 1972, the State of Alaska had management programs for 10 species of marine mammals including walrus, sea otter, polar bear, belukha whale, Steller sea lion, and ringed, ribbon, bearded, spotted and harbor seals. Those programs included population enhancement, habitat protection, monitoring and assessment, and controlled utilization based on sustained yield. Many of the state's programs ended with passage of the MMPA. In 1973, Alaska applied for return of management authority for the 10 species as provided for in Section 109 of the MMPA. After an unsatisfactory period from 1976-79 of managing walruses under Section 109 provisions, Alaska sought remedial changes to the MMPA which were accomplished by amendments made in 1981.

Since the 1981 amendments, Alaska has twice reconsidered its role in marine mammal management. After holding an extensive series of public meetings in 1984-85, the state administration concluded that, while state management of all 10 species would be

Hon. Gerry E. Studds

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May 9, 1988

beneficial and appropriate, limited resources precluded applying for return of management authority. In 1987, Alaska Department of Fish and Game (ADF&G) staff recommended that, due to changes in the status of certain populations and the lack of current data on others, further consideration for resumption of state management should be given only to polar bears, walruses, and sea otters. Meetings were held to discuss this idea and to explore various options for marine mammal management in Alaska.

The concerns and opinions expressed by Alaskans at these meetings identified an array of issues relating to marine mammal conservation and management. Major concerns related to the importance of these animals to Alaskans, the health of mammal populations, habitat protection and the need for ecosystem-based management, allocation of consumptive uses, technical aspects of state regulatory processes and MMPA provisions, research and monitoring requirements, enforcement capabilities, sources of program funding, and others. It was evident that these concerns related not only to polar bears, walruses, and sea otters, but to all species that occur off Alaska and interact with its residents and other resources.

During the course of these meetings it was apparent that Alaskans recognize the need for protection and management of marine mammals. Alaskans also expressed a strong sense that they want to participate in management decisions, but that they are not entirely satisfied with the status quo or prospective state management as would be allowed by Section 109 of the MMPA. Due to administrative and legal constraints, funding problems, public concerns, and other factors, the state decided not to apply for return of management for any species at this time.

The state considers the need to establish a system that will foster the development and implementation of management programs to be of paramount importance. It is inappropriate that no comprehensive management plans have been developed in the 15 years since implementation of the MMPA. Recent population changes such as have occurred for Pribilof fur seals and Steller sea lions amply demonstrate that the protective, minimal management philosophy contained in the MMPA, which are otherwise affected by other uses of the ocean's resources, does not guarantee healthy, stable population levels in all cases. While management programs should be developed for all species, the need for active management is especially acute for those species that interact most significantly with humans. Recognizing the need for management-planning, user groups in Alaska have already made significant progress in development of plans for polar bears and walruses. These efforts provide an excellent starting point as our proposed program gets underway.

The Alaska Department of Fish and Game has developed recommendations for a structure that would allow cooperative management planning with formal involvement of federal agencies, ADF&G, user groups, conservationists and other interested parties. This

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May 9, 1988

cooperative planning approach has also been given tentative approval by Alaska Native organizations and some conservation groups.

Such a cooperative approach to development and implementation of management programs has been highly successful for species such as caribou and belukha whales in northern Canada, and has allowed significant progress in rehabilitation of waterfowl populations on the Yukon-Kuskokwim Delta in Alaska. The objective in this case is to combine the efforts of federal agencies, which have the responsibility for management of marine mammals under the Act, with the interest and expertise in marine mammals possessed by the State of Alaska, and the needs and desires of potentially affected interest groups. It is especially important that Alaska Natives who continue to use marine mammals for subsistence and the manufacture of handicrafts, are involved in a formal and functional way throughout the process.

The process that ADF&G has recommended involves a continuation of federal management under existing provisions of the MMPA. Comprehensive management plans would be prepared jointly by the appropriate federal agency, the state, user groups, and other interested parties. When fully developed and agreed upon, management plans would be submitted to the appropriate secretary (Interior or Commerce) for approval and implementation through either federal procedures or cooperative agreements. While this process does not now require changes to the MMPA, we request that the Congress support these efforts through the active participation of the federal agencies in the cooperative management planning process, and that adequate funding be made available for management programs and the research and monitoring required in support of them. The State of Alaska is committed to maintaining a marine mammal staff to work on management plans, establishing and funding the operation of a marine mammal advisory committee composed of interested citizens, and providing administrative and logistical assistance. If the federal agencies commit to participation in this process, the state will explore the possibility of establishing a marine mammal advisory committee in fall 1988.

Marine Mammal/Fisheries Interactions

One of Alaska's principal concerns at this time involves the interactions between marine mammals and fisheries. Many of the millions of marine mammals that live off Alaska feed on fish and shellfish that inhabit areas where commercial fisheries are operating. To some extent during prosecution of these fisheries marine mammals are taken. In the cases where the marine mammals species is determined to be depleted, there are no provisions in the MMPA to allow for this incidental take. These fisheries constitute some of the most important economic opportunities available to the State of Alaska. Shutting them down would create severe economic dislocation. Presently, interested groups are trying to develop a workable solution to these problems. We

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May 9, 1988

are encouraged by these efforts and will work with the interested parties and this committee in that endeavor.

Research

There is a need for Congress to provide substantial funding for marine mammal research and management programs. Research on marine mammals is difficult and costly. However, many new techniques (e.g., satellite telemetry and genetic fingerprinting) have recently been developed and could be applied in order to answer some of the most pressing questions. In the absence of sound scientific data, questions relating to marine mammal conservation are answered by the courts. We believe that significant decisions regarding management of important resources should be based on biological considerations. Funding levels must be sufficient to ensure that research is not only directed toward endangered or "high-profile" species, but also addresses significant issues relating to populations that are abundant or of lower public interest. Lack of data resulting from lack of funds has hampered the nation's efforts on marine mammal conservation and management. The marine mammals of Alaska are a great treasure, not only to Alaska, but to the nation and to the world. We must conserve and manage them wisely.

Thank you for the opportunity to provide this testimony to the Committee.

Sincerely,

John W. Katz for
Steve Cowper
Governor

cc: All Subcommittee Members
Senator Stevens
Senator Murkowski
Congressman Young



American Association of Zoological Parks and Aquariums

LEGISLATIVE REPRESENTATIVE'S OFFICE

1110 VERMONT AVENUE, N.W., SUITE 1160, WASHINGTON, D.C. 20005

(202) 429-0949

April 15, 1988

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APR 20 1988

The Honorable Gerry E. Studds
Chairman
Subcommittee on Fisheries, Wildlife Conservation
and the Environment
House Annex #2, Room 544
Washington, D.C. 20515

RE: REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION
ACT

Dear Chairman Studds:

The American Association of Zoological Parks and Aquariums (AAZPA) is interested in the reauthorization of the Marine Mammal Protection Act. We request that the Committee consider expansion of the Act so that permits may be issued for the taking and importation of marine mammals for purposes of scientific research and enhancing the propagation or survival of the affected species or population stocks.

AAZPA is the largest professional zoological park and aquarium organization in the world. AAZPA represents virtually every major zoological park, aquarium, wildlife park and oceanarium on the North American continent and the vast majority of the professional staff members employed therein. AAZPA also represents and is the official spokesman for nearly 300,000 members of various zoological park and aquarium support organizations that offer assistance to zoological facilities in their communities. Collectively zoos and aquariums in this country annually play host to more than 100,000,000 visitors.

Permits may be issued under the Marine Mammal Protection Act for scientific research and public display purposes. In the case of a depleted marine mammal, permits may be issued only for scientific research purposes. The Act defines a depleted species as a species listed as an endangered or threatened species under the Endangered Species Act or otherwise determined by the Secretary of Interior or Commerce to be below its optimum sustainable yield.

Authority to issue permits for purposes of enhancing the propagation or survival of the affected marine mammal species or population stocks exists under the Endangered Species Act. However, that authority cannot be applied to marine mammals because the ESA specifies that the more restrictive provisions of the MMPA apply.

A nonprofit, tax exempt organization dedicated to the advancement of zoological parks and aquariums for conservation, education, scientific studies and recreation.

The following species of marine mammals are among those listed as depleted: southern sea otters, manatees, dugongs, and monk seals. Northern sea lions and fur seals will probably be listed as depleted before the end of 1988. Most of these species are rarely maintained in captivity. Thus zoological institutions and aquariums have not developed the experience or, in some cases, the expertise in management techniques in captive propagation. However zoological institutions and aquariums have achieved considerable success in captive propagation of related marine mammals. This indicates that management techniques are available and could be adapted to these similar species.

AAZPA believes that the current language relative to take of depleted species for only scientific research is too restrictive. We recommend that the overall goals of the Marine Mammal Protection Act would be better achieved if the Act were amended to allow zoological institutions with the appropriate facilities to act as sanctuaries for those listed species with the goal of establishing a captive population that could ultimately supplement wild populations in the future.

Numerous studies indicate that the appropriate time to establish self-sustaining populations is when populations have sufficient members to allow for such activities. Restricting captive endeavors until stocks are further depleted could lead to a species disaster. Marine mammal experts within the zoological and aquarium community need to be encouraged to begin appropriate studies.

The following is proposed language to amend the MMPA:

Section 101(a)(1) of the MMPA: "Permits may be issued by the Secretary for taking and importation for purposes of scientific, research, to enhance the propagation or survival of the affected species or population stock, and for public display if ..."

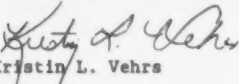
Section 101(a)(3)(B) of the MMPA: "Except for scientific research purposes and to enhance the propagation or survival of the affected species or population stock as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

Section 102(b) of the MMPA: "Except pursuant to a permit for scientific research or to enhance the propagation or survival of the affected species or population stock issued under section 104(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was ..."

Section 104(c) of the MMPA: "Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of display, to enhance the propagation or survival of the affected species or population stock, or scientific research, shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of display, to enhance the propagation or survival of the affected species or population stock, or scientific research shall furnish the Secretary a report on all activities carried out by him pursuant to that authority."

We thank you for the opportunity to submit these comments and look forward to working with you and your staff on this issue. We request to have these comments made part of the hearing record.

Sincerely,


Kristin L. Vehrs



MAY 23 1988

Safari Club International

4800 WEST GATES PASS ROAD
TUCSON, ARIZONA 85745
(602) 620-1220 TELEX 880149

May 19, 1988

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The Honorable Gerry E. Studts, Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
Room H2-543
U.S. House of Representatives
Washington, DC 20515

RE: Hearings on Marine Mammal Protection Act

Dear Mr. Studts:

We understand that you have recently held hearings in regard to reauthorization of the Marine Mammal Protection Act of 1972. We request that you take the following views of Safari Club International into account as you move to mark-up. These views were expressed to various staff members in a meeting held on March 24, 1988.

Safari Club International is an international organization of sportsmen and conservationists, representing nearly one million people worldwide. In addition to our general membership and associated organizations, we have eighty-four chapters in thirty-eight states and six foreign countries.

We have two specific concerns about the Act. First, we believe that the prohibition on importation of marine mammal products imported from Canada should be lifted legislatively. Second, we would like to see an amendment that makes it more feasible to return jurisdiction for marine mammal management to the state of Alaska.

Canada allows the hunting of many species of marine mammals, pursuant to a thorough and professional management program. Most of the marine mammals occur in areas inhabited by indigenous Canadian Natives, and are important in the economy of those peoples. Although Americans can go to Canada for sport hunting or can buy marine mammal handicrafts in Canada, the Act does not allow them to bring them back their sport hunting trophies or their handicrafts to the United States. Thus, Canadian Natives are denied the economic benefit of the few natural resources which occur in their area, even

GOVERNMENTAL AFFAIRS COMMITTEE

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COUNSEL

Richard Parsons

though the resources are well managed. At the same time, their American cousins (sometimes literally) can get such benefits, even though the resources they are using are not managed at all because of the peculiarities of the Act. (The states cannot manage the resource, because their jurisdiction was preempted, and the Federal government cannot manage the resource in regard to taking for handicraft and subsistence unless the resource is declared "depleted.")

It is possible, under the Act, for Canada, either directly or through the Department of the Interior, to request a waiver of the moratorium to allow such importations. This is a long, difficult and costly procedure. We believe that there is sufficient information available from Canadian officials to justify a legislative change that would allow the importation of marine mammal products from Canada.

In regard to the Alaskan situation, Alaska cannot manage its resource because its jurisdiction was preempted, and the Federal government has no management authority until it declares a species to be "depleted." Like the Canadian situation, the Act allows the return of jurisdiction to Alaska, but only through the complex, time-consuming and costly procedure of a waiver of the moratorium. This process is so difficult that despite changes made by the Congress several years ago, no state has utilized the procedure. We have attached an analysis of the steps required for a waiver of the moratorium for return of a state's jurisdiction.

We feel that this situation is intolerable. Moreover, it has led to mismanagement of the marine mammal resource. For instance, we are informed that there is concern among biologists over the taking of female polar bears in Alaska -- a practice which can seriously harm polar bear populations. In addition, the economic value of the polar bear resource to Alaskan Natives has dropped considerably in the last few years. We were informed by staff that Alaska and the Department of the Interior are working on some kind of management arrangement. However, we are concerned that under the strictures of the Act, it will be impossible for any meaningful management to take place.

It is time for Congress to remedy these flaws in the Act.

Sincerely yours,

Richard M. Parsons
Richard M. Parsons

Counsel to the Governmental Affairs Committee

MMFA
16 USC 1379

Procedures and Requirements for
Transfer of Management Authority
to Alaska

A. In order to begin the process for a return of jurisdiction the state must submit to the Secretary of Interior a written program for conservation and management of the species. The state must be able to show that:

1. it has draft or current laws and regulations sufficient to implement the program
2. the program is consistent with the goals and policies of the Marine Mammal Protection Act and the Polar Bear Treaty
3. the program requires all taking to be humane
4. the program does not permit any taking until state has made and implemented a final determination
 - that the species is at "Optimum Sustainable Population" (OSP) [NOTE: the term OSP is defined as follows:
the number of animals in any population stock which will result in the maximum productivity of the population, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent part.]
 - that fixes a maximum number of animals that can be taken without reducing the population below OSP.
5. The state determination (in 4, above) will be made consistent with the following procedural guidelines:
 - there must be an initial determination
 - the state must identify the documentation on which its initial determination is based
 - this documentation must be made available to the public under reasonable circumstances
 - an opportunity for a hearing must be provided by the state
 - a hearing, if requested, must allow for oral and written evidence and cross-examination; the state must provide a list of its witnesses and the documentation on which they will rely
 - the final determination must be made solely on basis of the hearing record, if one is held
 - the state must include a statement of reasons for its determinations
 - state law must provide an opportunity for judicial review of the final determination
6. the program does not allow the taking of numbers of animals that exceed that number necessary to maintain OSP

3. It will be reviewed in Washington by staff, by an Assistant Director, and by the Director of the Service
 4. It will get approval from the Assistant Secretary of Interior
 5. the proposed finding will be published in the Federal Register
 6. at least 30 days (90 days is more likely) must be allowed for comments
 7. comments must be read and evaluated
 8. a final finding must be written and published
 9. the preamble to the final finding must respond substantively to all of the comments
 10. the final finding will follow the same drafting and review sequence as described above for the proposed finding.
- D. An Environmental Impact Statement is not required



Jack O. Snyder
President

June 20, 1988

The Honorable
Gerry E. Studds
Chairman, Subcommittee on Fisheries and
Wildlife Conservation and the Environment
H2-543 House Office Building, Annex II
Washington, D.C. 20515

RE: Reauthorization of the Marine Mammal Protection Act

Dear Chairman Studds:

Sea World, Inc. wishes to inform you of its position in support of the Reauthorization of the Marine Mammal Protection Act. Sea World, Inc. represents the Harcourt Brace Jovanovich, Inc. family of parks. Sea World parks are located in Orlando, Florida, San Diego, California, San Antonio, Texas and Aurora, Ohio.

Enacted by Congress in 1972, the Marine Mammal Protection Act established a federal responsibility for the consideration, management and study of marine mammals, their habitat and other important components of marine ecosystems. Its passage established the most stringent of animal welfare requirements for the care and treatment of animals maintained in captive environments. The responsibility for implementation of these programs rests jointly with the U. S. Department of Commerce--National Marine Fisheries Service; U.S. Department of the Interior--Fish and Wildlife Service; and, U.S. Department of Agriculture--Animal and Plant Health Inspection Service. The Marine Mammal Commission and its Committee of Scientific Advisors was established to ensure that implementation of the program is based upon sound scientific evidence. In the international arena, the Act encourages support of multilateral agreements which are consistent with the objectives of the Act.

Sea World, Inc. • 7007 Sea World Drive • Orlando, Florida 32821 • (407) 351-3600

A Harcourt Brace Jovanovich Company





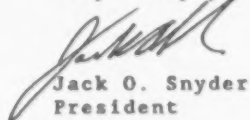
The Honorable Gerry E. Studds
Re: Reauthorization of the MMPA
July 20, 1988
Page Two

A document submitted by a coalition of animal rights organizations to the hearing record in reference to public display and scientific research permits states that "as currently administered, the Act no longer provides inhibitions to questionable practices except for the burden of properly completing the paperwork required." This statement is, in our opinion, extreme.

We believe that certain regulatory and enforcement policies may require improvement. However, this is not to be interpreted as a suggestion that present regulations are inadequate or unworkable in carrying out the terms of the Act. After approximately 14 years of operation, it is time to conduct a review of past practices in order to update and improve the effectiveness of the program.

The animal rights coalition is aware that their concerns as well as those of the zoological community, scientific community and government are currently under regulatory review at the Department of Commerce, National Marine Fisheries Service. We believe that the constructive course of action is to await the determinations of this government agency and the Marine Mammal Commission on the permit program review. These determinations will serve as a reasonable and appropriate platform for the consideration of regulatory revisions, if any.

Very truly yours,



Jack O. Snyder
President

JOS:je

S.O.S.

The Honorable Gerry E. Studds
Chairman
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
Room 1334, Longworth H.O.B.
Washington D.C. 20515-6230

May 27, 1988

Re: Statement of Save Our Shellfish (S.O.S.) on the reauthorization of the Marine Mammal Protection Act (MMPA).

Dear Mr. Studds,

S.O.S. respectfully submits the following comments on the 1988 MMPA reauthorization.

As divers and diving fishermen, we regularly enter the marine environment to view the various components of a complex world on a firsthand basis. The ocean is not a foreign or forbidding place—we're comfortable—we see mankind as a natural component of the marine ecosystem. For this reason, our views of the sea are somewhat different.

In comparison to some marine mammals, the sea otter for example, some divers see themselves as a human equivalent. Many human divers hold their breath, as marine mammals do, and seek many of the same species as a food source. It's not uncommon to find sport divers with thousands of hours of underwater experience. Some sport and commercial divers have 5000 hours underwater—some as many as 20,000 hours. These divers are unique among humankind. Scientists have recently demonstrated that some humans have a "diving reflex", an ability to restrict blood flow to the extremities—the same reflex marine mammals use.

We point out these facts because we feel our underwater experience gives us an advantage over other commentators. We often meet those from the environmental community, people dedicated to wildlife preservation, including marine mammals, who have little or no underwater experience. We have also met researchers on government grants and marine mammal project leaders who do not dive. We find this puzzling to say the least. We suspect that these differing levels of underwater experience are one source of polarization over marine mammal issues.

Another advantage that S.O.S. has is our willingness to work with state and federal government agencies to not only define problems, but, seek solutions. Our experience is broad. We've worked as technical review team members with U.S. Fish and Wildlife Service (FWS) on the sea otter translocation mapping study. We co-founded an alternative fishing gear project for gill-net fishermen affected by State of California legislation designed to protect sea otters.

In 1984 and 1985, S.O.S. was selected by commercial and recreational shellfish fishermen to present oral testimony before the subcommittee's reauthorization of the MMPA and Endangered Species Act (ESA) respectively. S.O.S. also presented testimony to the U.S. Senate in 1985.

SAVE OUR SHELLFISH

P.O. BOX 263, LITTLE RIVER, CA 95456 (707) 937-2211

Honorable Gerry E. Studds

May 27, 1988

Our task today is to relay our views and concerns for the ocean to those who have not shared our experience. We are "inner-space" pioneers. Freelance inner-space astronauts without a NASA budget. If we fail this year, our comments provide a record for future marine investigators. We hope it will help expand the thinking of those who read this.

Our basic concern is for the floral and faunal planktonic life of the world's oceans—the living soup. As divers we see this life swirling before our facemasks. Fishermen rely on the individual survivors of various species of invertebrates and vertebrates who make it to adulthood. So do marine mammals. In 1988, fishermen, marine mammals and marine birds must compete for resources heavily affected by pollution and loss of habitat. As divers, we often view the pristine and the polluted areas.

It's a tremendous experience to view plankton and juveniles—an entire food web before one's eyes. It's depressing to view sick and injured bottom. Fishermen and wildlife must adjust to loss of resource and habitat.

Because of our firsthand observations, we recognize that there are limits to marine resources. Life does not exist everywhere just because there are rocky habitats. The sea is dynamic. Good habitat is limited.

California shellfish fishermen are highly regulated. We must follow laws designed to promote conservation of valuable marine resources. We are limited by size, bag limits, area closures, seasons, and harvest tools.

On the other hand, marine mammals do not have these limits. They take all sexes, all seasons, all sizes of fish and shellfish. We recognize that high populations of marine mammals must be furnished with vast quantities of food. In some areas of California, hundreds of miles of once productive fishing grounds have been given to marine mammals to provide for their survival. One example is the sea otter, Enhydra lutris l. which exists along the south-central coast. Abalone landings along this stretch of rugged coast once averaged over 2 million lbs. per year for over 50 years. Our Dungeness crab and sea urchin fishery and several clam fisheries have been lost to sea otters.

Pinnipeds also consume vast quantities of fish. Recent assessments on the consumption rates of four common pinnipeds in California, California sea lions, Zalophus californianus; harbor seals, Phoca vitulina; northern fur seals, Callorhinus ursinus; and northern elephant seals, Mirounga angustirostris are consuming an estimated 951,000 metric tons of fish per year or 2605.47 metric tons per day (5,745,082 lbs. per day). This amount of fish is almost five times the quantity of fish landed by all commercial fishermen in California.

PERILS OF SUCCESS

Much of the discussion related to this year's reauthorization appears to center on the depleted species—the downside of recovery. We would like to point out that there is also an upside. The information we have indicates that of 116 recognized marine mammal species, only 18 are currently listed as threatened or endangered under the ESA.

It would therefore seem that the protection afforded marine mammals over the past 50 years (some since the 1911 International Fur Treaty) and more recently, the MMPA has succeeded. Some whales, like the California grey, Eschrichtius gibbosus, are candidates for de-listing.

Honorable Gerry E. Studds

May 27, 1988

As Charles F. Cooper and Brent S. Stewart stated in their paper, The Perils of Success: Implications of increasing Marine Mammal Populations in the Southern California Bight, delivered to the Ocean Studies Symposium, Asilomar California, November 7-10, 1982:

" A half century of successful protection and conservation has allowed several species of marine mammals in the Southern California Bight to increase their populations exponentially. Northern elephant seals are increasing about 14% per year; California sea lions, northern fur seals, and harbor seals somewhat less. Steller sea lion numbers have declined for unknown reasons. Sea otters and Guadalupe fur seals are incipient colonizers. Whale abundance is also increasing, but their population status is poorly known. The increasing marine mammal populations, hearting as they are, will bring inevitable changes and conflicts. These include shifts in ecosystem structure and relative species abundance, impacts on commercial and sport fisheries, favorable and unfavorable interactions with tourism and recreation, disturbance of animals by military operations, and interactions with oil development and commercial shipping".

" Our principal conclusion is that rapid increase of pinniped abundance is likely to alter the marine ecosystem significantly, including its human component. Managers and policymakers have tended to regard living marine resources as independent discrete populations, not as components of an ecosystem governed by complex interactions. This is no longer sufficient in a changing society with increasing demands on resources of all kinds".

The MMPA sets forth a national policy designed to protect and encourage the development of marine mammals to optimum sustainable population (OSP) levels consistent with the maintenance of the health and stability of the marine ecosystem. It is generally stated that marine mammals will not upset the natural balance.

In regards to sea otters and some shellfish, this may not be the case.

One species of abalone, Haliotis assimilis (aka H. kamtschatkana assimilis), probably the rarest of the eight species of abalone found in California, appears to have been depleted by foraging sea otters in recent years. The range of H. assimilis overlaps the southern end of the sea otter range. Commercial landings of H. assimilis average less than three lbs. per year. S.O.S. supports a moratorium on the harvest of H. assimilis.

S.O.S. has raised concern for the status of H. assimilis. We believe it to be a threatened or endangered species. So far, we have had little positive reaction from the state or federal agencies we've contacted. The conservation/environmental community has demonstrated little concern. It appears there is little concern for endangered marine invertebrates. S.O.S. is preparing a biological assessment to be forwarded to the Secretary of Commerce.

Kenyon (1969) found that large populations of sea otters could seriously deplete food resources within their home range. Evidence is available that this does in fact occur.

Honorable Gerry E. Studds

May 27, 1988

McLean (1962) presents convincing evidence that the red sea urchin, Strongylocentrotus franciscanus has been nearly exterminated in a particular area on the California coast which is occupied by a considerable number of sea otters.

Wild (1974) found that in newly colonized areas where abalones were abundant, 100 sea otters could consume 0.5 to 1.0 million lbs of abalone (whole weight) in one year.

Wendell (1986) assumed consumption rates of Pismo clams (80 clams/otter/day) to illustrate the impact sea otters had on Pismo clam resources in the Pismo Beach area of California. Two conclusions were drawn from these data which have direct bearing on the debate concerning sea otter/shellfish fishery relationships. Firstly, sea otter foraging, rather than human impact from legal harvest, illegal harvest, pollution, and/or vehicle traffic on beaches, have resulted in the loss of Pismo clam fisheries within the sea otter range. Secondly, once sea otters are established along clam bearing beach areas, any future harvestable stocks of clams will be fully utilized by sea otters, preventing the return of a fishery.

We expect that as other marine mammal populations expand, primarily sea lions and seals, other living marine resources will be affected similar to current affects on steelhead, Salmo gairdnerii spp. in other Pacific states. Some of these recent impacts on Salmonidae appear to be learned behaviors. Salmon trollers are reporting difficulting in some areas where sea lions have learned to follow boats and take fish from troll lines. Sport fishermen report the same sort of problems. Sea lions, foraging at the mouths of some rivers may be having a negative affect on fish returning to spawn.

Again, we are concerned for what we see as an emphasis on the top predators and a potential for neglect of the lower echelons—the plankton and juveniles. We see a need for continued research into trophic levels of take by marine mammals, especially pinnipeds.

From their 1941 book, The Sea of Cortez, John Steinbeck and E.F. (Doc) Ricketts wrote:

"The disappearance of plankton, although the components are microscopic, would probably in a short time eliminate every living thing in the sea and change the whole of man's life, if it did not though a seismic disturbance of balance eliminate all life on the globe. For these little animals, in their incalculable numbers, are probably the base food supply of the world. But the extinction of one of the rare animals, so avidly sought and caught and named, would probably go unnoticed in the cellular world".

The recent sea otter translocation to San Nicolas Island, Ventura County, California seems to be the grossest example of concerns expressed by Steinbeck and Ricketts. Without regard for the richness of invertebrate fauna represented at San Nicolas Island or its value as a pristine spawning ground, FWS recently translocated a population of sea otters in the hopes of developing a breeding colony. Substantial evidence exists that the sea otter in California is no more than a slightly isolated population, in healthy condition, from a greater healthy population which extends into Alaska. FWS chose to sacrifice the breeding stock of lobster,

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abalone, and sea urchin without an understanding of the potential consequence. FWS research indicates impacts on shellfish fisheries at San Nicolas Island by foraging sea otters will cause collapse within five years. We agree with this assessment as it appears supported by research mentioned above.

COMPROMISE

While we recognize the need for compromise on the complex legal issues associated with this years MMPA reauthorization, we are concerned that even more complex biological issues may get lost in the shuffle.

We are concerned for the costs associated with the proposed observer program. Will the estimated \$ 2.5 million budget be taken in part or totally from existing research programs ? How will onboard observers be insured ? Will the requirement for data collecting make criminals out of those fishermen who fail to comply ? Will these traditional small boat fishermen (the last significant hunter/gatherers in our society) understand the requirements being imposed on them in such a short period of time ? Are goals of the compromise so broad as to overlook regional differences and varying problems ? Does the proposed compromise only add an additional layer of bureaucracy to what may actually be a problem of perception ?

S.O.S. would like to support amendments to the MMPA that would allow for the take of marine mammals in commercial and recreational fishing operations as long as the taking is part of an overall strategy designed to recover depleted species. We suggest a more enlightened view of these animals which would consider the viability of the population and not necessarily the nebulous goals of OSP.

If the U.S. is to maintain its commercial fishing fleets, the MMPA, ESA, and goals of the Magnuson Fishery Conservation and Management Act must be amended for consistency.

Thank you for your consideration.

Respectfully submitted,



Steven L. Rebuck

References:

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THE OCEANIC SOCIETY

EDUCATION • RESEARCH • CONSERVATION

EXECUTIVE OFFICES
1536 16th Street, N.W.
Washington, D.C. 20036
(202) 328-0098

June 8, 1988

Honorable Gerry E. Studds
Chairman, Subcommittee on Fisheries and Wildlife
Conservation and the Environment
House Merchant Marine and Fisheries Committee
U.S. House of Representatives
House Annex II -- Room 543
Washington, D.C. 20515

Re: MMPA Permit Procedures

Dear Chairman Studds:

On May 10, 1988, your Subcommittee on Fisheries and Wildlife Conservation and the Environment held a hearing in relation to the reauthorization of the Marine Mammal Protection Act (MMPA). The Oceanic Society and ten other conservation groups sponsored testimony that was prepared by Nancy Hicks, Animal Protection Institute of America, and presented by Bo Brickleyer, Greenpeace, U.S.

In reviewing that testimony prior to signing on, Oceanic Society staff focused attention on the various recommendations, each of which we support. Unfortunately, we inadvertently overlooked a portion of the narrative text related to the public education-related recommendation which stated that (page 10): "the importance of public education in aquaria is entirely secondary to their potential as entertainment outlets and money-making ventures." We do not agree with that statement. If the hearing record is still open, I respectfully ask that this letter be included so that our position on that matter is correctly reflected.

In the Society's view, public education is, for many aquaria in the United States, an extremely important, primary function. The expertise of aquaria staff, use of brochures and other explanatory information in exhibit areas and the planning and design of exhibits, among other factors, reflect a strong commitment to education of the public -- individuals of all ages, interests and levels of expertise.

I also wish to convey our support for the recent efforts of interested parties to reach consensus on the issue of whether the

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Page Two

MMFA should be amended to allow display permits for the take of depleted species. It is our understanding that an amendment has been agreed to, in principle, whereby such takings could be approved if they are initiated as a result of an executive agency determination that such taking would facilitate the recovery of the species. In our view, the agreed upon amendment is an acceptable and workable approach that should address the concerns previously raised in relation to this issue.

Sincerely,



Clinton Curtis
President

cc: Bo Brickleyer, Greenpeace, U.S.
William Braker, Shedd Aquarium
Nancy Hicks, Animal Protection Institute of America
Kristin Vehrs, American Association of Zoological Parks
and Aquarium

JOHN G. SHEDD AQUARIUM

1200 SOUTH LAKESHORE DRIVE CHICAGO ILLINOIS 60605
312-939-2426

WILLIAM P. BRAKER DIRECTOR

June 6, 1988

Senator Ernest F. Hollings, Chairman
Commerce, Science and Transportation Committee
and National Ocean Policy Study Subcommittee
501 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hollings:

These comments are submitted with respect to the Marine
Mammal Protection Act Reauthorization.

This institution and its staff support completely the intent
and purposes of the Marine Mammal Protection Act of 1972 and
urge that it be reauthorized in its present form, except that
some modification be made to allow taking specimens of depleted
species for captive propagation. Several problems arise
occasionally with the administration of the Act, but these are
procedural matters that can be resolved through discussions
with staff members of the National Marine Fisheries Service,
Fish and Wildlife Service and Marine Mammal Commission.

Of concern, however, is the testimony prepared by the Animal
Protection Institute of America and submitted May 19, 1988, on
behalf of the American Cetacean Society et al. We wish to
address this document and discuss the various points contained
therein. For purposes of identification, we shall refer to the
eleven groups that are signatories to the document as the
"Consortium". The subjects for discussion will be referenced
by page number of the Consortium's document.

Page 1

The statement is made that the Act (MMPA) as currently
administered no longer provides inhibitions to questionable
practices and that the review process has become automatic
and routine.

Comment: This statement is subjective, representing the
opinion of the Consortium. In fact, each permit is care-
fully reviewed and if illegal (for an endangered species,
e.g.), incomplete or for a purpose not covered by the Act,
it is rejected or returned for further information. The
fact that only two of 295 research permits and only eight of
261 display permits were denied after being forwarded to the
Marine Mammal Commission indicates how carefully the permits
are reviewed by NMFS.

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Page 2

It is noted that Congress wrote detailed statutory language relating to the permitting process leaving little discretion to the Secretary, yet it is further noted that under Section 104(b) of the MMPA a minimal set of criteria are laid out.

Comment: The Consortium fails to make its point. Either the language is detailed or it is minimal; it cannot be both.

The motives for research are questioned and it is implied that research should be evaluated by a governmental agency.

Comment: Governmental review may be appropriate when public funds are used, but even this smacks of censorship. Judgment of research projects should be limited to their impact on wild populations, as provided for in the Act.

Page 4

It is stated that "certainly" lethal and non-lethal research can cause modifications in behavior and disrupt social structures.

Comment: We agree that lethal research will modify behavior (the animal ceases all behavior) but do not agree that non-lethal research will do so. What evidence is there to substantiate this statement?

Page 7

There is discussion of a permit to take bottlenose dolphins, which was issued to an applicant who allegedly had a poor record of animal care.

Comment: We are unfamiliar with the applicant to whom the permit was issued and the various points of contention concerning the organization. If numerous animals died due to poor care, the causes of death should be documented and readily available, and the Consortium should have no trouble substantiating this charge. Charges based on hearsay or speculation are not acceptable as evidence.

Page 8

The statement is made that permits to take captive (sic) cetaceans have been granted despite grossly inadequate facilities; that insufficient attention is given to the previous record of applicants; and that these may be animals not suited for aquaria.

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Comment: Standards for maintenance of marine mammals are set by USDA/APHIS. If a facility is approved by APHIS, then it is not, by regulation, grossly inadequate. In reviewing permits for research or public display, the effects on the wild population are considered, not past mortalities. Also, if all animal display facilities kept only the "easy" animals, we would today have only guppies, rabbits and raccoons on display. Only through research and advanced husbandry can we learn to maintain the difficult species.

The Consortium contends that NMFS turned the entire job of site inspection over to APHIS.

Comment: NMFS did not turn over the job to APHIS. Inspection of facilities was made the responsibility of APHIS when the Congress amended the Animal Welfare Act.

Page 9

The statement is made that, "The purpose of display permits under the MMPA is the education of the public concerning marine mammals."

Comment: While public education is the intent and purpose of those institutions that apply for marine mammal display permits, it is inaccurate to state or suggest that the MMPA requires educational intent on the part of the applicant. Under Sec. 101(a)(1) of the Act, permits may be issued by the Secretary for taking and importation for purposes of scientific research and public display if Further, Sec. 104(c) states, "Any permit issued . . . for purposes of display or scientific research" And also, in FINDINGS AND DECLARATION OF POLICY Sec. 2(6): (The Congress finds that) ". . . marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic" Not only do these sections not require or even suggest that public display has an educational purpose, the words "education" or "educational" fail to appear in the text of the entire act.

Page 10

The text of the Consortium's document reads, "We submit that the importance of public education in aquaria is entirely secondary to their potential as entertainment outlets and money-making ventures."

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Comment: It is egregious and denigrating to suggest that profit is the primary purpose of public display of marine mammals. This institution, the John G. Shedd Aquarium, is a not-for-profit organization, founded for the educational display of aquatic life. It is governed by a board of volunteer trustees and has no stockholders to whom it pays dividends. Many other aquariums are operated in the same manner. This statement is irresponsible and deserves an apology.

Page 10

Stephen Kellert is quoted with respect to the educational value of zoos (and by association, aquariums). According to the Consortium's reading of Kellert's paper, children learn little from visiting zoos, and even less from aquariums.

Comment: The quotes attributed to Kellert are incomplete, taken out of context or misinterpreted. The entire paper needs to be read to fully understand Kellert's thrust, not intentionally selected phrases.

Page 11

The Consortium proposes that, "A stronger definition of public education is needed and standards for level and content of educational material should be set. Plans for educational programs should accompany permit applications."

Comment: Again, education of the public is never mentioned in the Act. Moreover, the Consortium is proposing that the federal government set standards and content of educational programs at aquariums. By logical extension, the government should do the same at zoos, natural history museums, art museums, botanical gardens and public and private schools.

Pages 11-12

The frequency and duration of animal shows is questioned and it is stated that animals of a current permit holder perform 30 minutes of each hour. It is suggested that both agencies (NMFS/APHIS) set standards.

Comment: Performances of marine mammals are regulated by the Animal Welfare Act (Subchapter A, Part 3, Subpart E, Sec. 3.111(c)). Duplicate regulations by NMFS are not needed.

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 Page Five
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Most facilities that display performing marine mammals alternate teams of animals to provide rest periods. Moreover, the Consortium document is imprecise in stating whether it is the same animals of the same species in the same pool that perform 30 minutes out of every hour or whether this frequency reflects a variety of performances by different species with staggered starting times to enable the visitors to see all shows.

Pages 12-14

The Consortium opposes the proposal to amend the MMPA to allow capture of depleted species for captive propagation. It further argues that no aquarium has shown that it can successfully propagate and restore to the wild non-depleted species.

Comment: Every effort should be made to breed depleted species. The successful experience with the whooping crane, peregrine falcon, California condor, lowland gorilla and Arabian oryx are reasons enough to try captive breeding of marine mammals. Contrary to what is stated, aquariums have been successful in breeding harbor seals, sea lions, bottlenose dolphins, killer whales and others. But these results are slow to come. It is not like breeding a colony of laboratory mice. To be successful in breeding marine mammals, it is necessary to have a sufficient number of animals for a breeding pool, yet many of the organizations in the Consortium regularly oppose issuance of permits for public display. One cannot criticize aquariums for not having successful breeding programs and at the same time hinder efforts to acquire the necessary breeding stock.

Page 14

The Consortium states they are not opposed to allowing institutions to take and care for orphaned and stranded animals provided the animal is restored to the wild.

Comment: If an institution spends time, veterinary care and its funds for rehabilitation of a stranded animal, it should be allowed to make the choice of keeping or returning the animal. If this is not done, the next orphaned animal could be allowed to die a slow miserable death on the beach. The Consortium expects aquariums to expend their own funds for rehabilitation, but earlier, page 10, they decry the fact that aquariums are "money-making ventures". Where is the money to come from?

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The Consortium addresses the subject of minimal standards for marine mammals.

Comment: Standards for marine mammals are the responsibility of APHIS under the AWA.

Page 15

It is suggested that facilities for housing stranded animals be subject to more stringent regulations.

Comment: If facilities are required to submit to stringent regulations of APHIS to rehabilitate stranded animals, it will impose harsh financial burdens on these facilities. Now, they spend their own funds (no taxpayers' dollars) to do this. The result of requiring licensed facilities meeting minimum space requirements will be the refusal of institutions in stranding networks to participate in "rehab" programs. Is the Consortium ready to "pick up the tab," about \$1500 annually for each rehabbed animal?

Page 16

The suggestion is made to require twice yearly status reports on marine mammals to provide an "early warning system" of illnesses. It is also speculated that stress-related illnesses, such as ulcers in captive marine mammals, may be high.

Comment: There is no evidence that stress-related illnesses are greater or lesser in captive or free-ranging marine mammals. Twice yearly reports will increase time spent and costs for reporting. Again, why single out marine mammals? Why not ask for similar reports for lions, elephants, gorillas and snakes?

It is suggested that veterinarians treating marine mammals should be trained in marine mammal medicine.

Comment: Most ethical veterinarians would agree with this position and assume the responsibility for their own training. But why stop with marine mammals? Why not require special training for zoo animals? Elephants are just as unique as dolphins.

Page 18

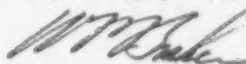
The Consortium suggests that whale watching cruises can have an impact on the whales being observed and new regulations to control this activity be established.

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Comment: It was inevitable that the Consortium would eventually turn their attention to whale watching programs. After espousing this activity as an alternative to seeing marine mammals in aquariums, they have found that, now, this is not acceptable because the whales don't want to be watched. Their solution is more regulations.

Thank you for taking the time to read these comments. If I can clarify any of the above, I will be pleased to do so.

Very truly yours,



William P. Braker
Director

PACIFIC FISHERIES LEGISLATIVE TASK FORCE

MAY 12 1988

May 6, 1988

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Honorable Gerry Studds, Chairman
U.S. House of Representatives
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
Room 1334, Longworth House Office Bldg.
Washington, D.C. 20515

Dear Representative Studds:

As you move into the final deliberations on the reauthorization of the Marine Mammal Protection Act, it is imperative that you review this Act in a manner that insures the continued existence of critical marine mammal species. The Task Force recognizes many of the positive strides that have already been accomplished as a result of this Act.

No one disputes a continued need for full protection for those species whose numbers are such that very real threats remain. There are, however, many species whose continued existence are no longer in doubt. Indeed their numbers are flourishing to the point where at least localized, and in some instances, relatively wide spread populations are now creating significant conflict with other wildlife and fisheries species. Any reauthorization must take into account the population realities of these varying population dynamics.

The Act must provide discretions to the management authority to insure that all appropriate management tools are available when necessary. If allowances for taking all appropriate means to reduce predation or competition are not addressed, a climate will be created in which the very species we are trying to protect are in fact adversely impacted. When people feel that the law is so unduly restrictive that actions must be taken on their own, the very populations we are trying to protect can be adversely affected.

Just as Congress amended the Endangered Species Act to recognize a true long term management and survival of the species is only possible if the climate is right for appropriate management, so must the Marine Mammal Protection Act be amended.

A clear statement of legislative intent must be incorporated into the record that states for those populations, both local and widespread, where no substantial threat exists to the species continued existence, all appropriate management techniques including (when necessary) lethal means are available to be authorized by the management agency.

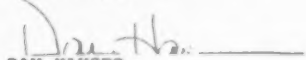
Single species management, while necessary where a species faces extinction or significant threat, must not become the way of life where such threats do not exist. The ocean is a ecosystem, not the sole habitat for any unique species. As long as man continues to impact that ecosystem in one form or another, balanced, multispecies ecosystems management should be encouraged.

In order to insure that the intent is fully met, the Act must authorize the Secretary of Commerce to have the tools necessary to provide this rational and balanced approach. The now infamous saga of the sea lion depredation on a limited run of steelhead in Washington state which are channeled through man made locks (in their quest for survival) is a clear example.

Both language and legislative intent must be crystal clear so that courts, which will inevitably be called upon to interpret these amendments, will clearly understand that Congress recognizes other legitimate users and multi-species management in the final adoption of this reauthorization. We believe that there is a critical need for the logical and environmentally sound amendments we have proposed.

Thank you for your consideration of these amendments.

Sincerely,


DAN HAUSER

DH: m

M·M·I·G

Marine Mammal Interest Group

12 May 1988

Ms. Gina De Ferrari
Subcommittee on Fisheries and Wildlife
Conservation and the Environment
Annex 2, Rm. H2-543
3rd & D Street S.W.
Washington, D.C. 20515-6232

RE: Reauthorization of the Marine Mammal Protection Act

Dear Ms. De Ferrari:

The purpose of this letter is to introduce you to the Marine Mammal Interest Group (MMIG), an organization serving the interests of professionals involved in the public display and research of marine mammals, and its position regarding the reauthorization of the Marine Mammal Protection Act (MMPA).

Since its founding in 1985, the MMIG has brought together a representative cross-section of the professional community involved with the public display and research of marine mammals. Its purpose is to serve as a conduit linking major organizations which share our objectives. Its efforts have already improved an awareness of the need for a proactive posture within the marine mammal community, addressed pending legislation, and encouraged the cooperative use of the resources available in our supporting organizations. As a result, the MMIG now represents professionals and organizations which annually serve millions of visitors to public display facilities and constitute a collective body of expertise covering the full spectrum of the knowledge and technical skills relevant to marine mammal husbandry, management, and research.

It is the opinion of the MMIG that the Marine Mammal Protection Act should be reauthorized, as it is currently written, for a period of no less than five years and that the funds necessary to insure its effective enforcement be provided. We believe that this legislation has had a positive impact on the maintenance and protection of the natural resource represented in marine mammals and should be maintained.

Professionals concerned with scientific research on marine mammals and their public display.

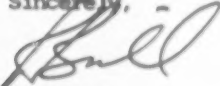
REPLY TO: R. Brill, c/o Brookfield Zoo, 3300 Golf Road, Brookfield, IL,
60513, (312) 485-0263, x441

-2-

It is the desire of the MMIG to become involved in the process necessary to the reauthorization of the MMPA. In addition to expressing the desire for reauthorization of the MMPA, it is the intention of the MMIG to offer any assistance deemed necessary and valuable to the legislative process. As a collective body, we are capable of providing professionally recognized expertise in all areas affected by the MMPA. If we can be of any assistance to your investigation and pursuit of this matter, please do not hesitate to call upon us.

Thank you for your attention and consideration.

Sincerely,



R. Brill
Chairperson/MMIG

RB/bjp

Morro Bay Commercial Fishermans Organization Inc.



P.O. BOX 450 MORRO BAY, CALIFORNIA 93442

The Honorable Gerry Studds
Chairman
Subcommittee on Fisheries
and Wildlife Conservation
and the Environment
1334 Longworth HOB
Washington D.C. 20515
(202) 225-4047

May 7, 1988

Dear Mr. Studds,

The Board of Directors of the Morro Bay Commercial Fishermans Organization is pleased to submit comments to the subcommittee in regards to this years reauthorization of the Marine Mammal Protection Act. We would appreciate it if these comments would be entered into the hearing record of May 10, 1988.

We begin our comments with a brief description of the fisheries at Morro Bay—past and present—followed by an assessment of marine mammal/fisheries conflicts.

Morro Bay is situated approximately halfway between San Francisco and Los Angeles. It is the only safe harbor between Santa Barbara and Monterey. Morro Bay currently harbors 181 commercial fishing vessels, 147 of which are considered active, plus a transient fleet from up and down the Pacific coast. Yearly fish landings average approximately 10. million lbs. with an estimated ex-vessel value of over \$ 6.2 million. Much of this product is utilized locally at fresh market or restaurants.

Morro Bay's fisheries have been heavily impacted by marine mammals for over 30 years. With the recovery of several marine mammal populations has come innumerable conflicts, affecting one fleet after another. Of greatest concern are interactions with California sea lions, Zalophus californianus; harbor seals, Phoca vitulina; and sea otters, Enhydra lutris L.

Historically, Morro Bay was once known as the "Abalone Capital of the World". Abalone harvested in the region, and landed primarily at Morro Bay averaged 2 million lbs. per year between 1916 and the mid 1960's. As the sea otter has gained in population and reoccupied range, abalone landing diminished to the point of total commercial collapse by the late 1970's. Two decades ago, there were 50 abalone fishing boats in the Morro Bay fleet. This fleet employed hundreds of local people. No more. The only active abalone divers from our community must earn their living by fishing 150 miles, either north or south, outside the sea otter range. (Note: The Morro Bay abalone fishermen were much maligned at the hearings for the preservation and protection of marine mammals, September 1971, see Sea Otters Ambushed, pg. 579).

The same down trend in available resource also affected the red sea urchin, Strongylocentrotus franciscanus harvest. This unique fishery originated in California just a few miles south of Morro Bay. Like abalone, this fishery

Chairman Studds

2

May 7, 1988

only exists outside the current sea otter range (Pt. Ano Nuaivo to the Santa Maria River). The red sea urchin fishery has become one of our state's most valuable export fishery, most of the processed roe being exported to Japan. State wide landings in 1986 were over 34. million lbs. with an ex-vessel value of \$ 9.7 million.

Sea otter have also precluded our local commercial Dungeness crab fishery apparently through foraging of egg bearing female crabs as they enter sandy beaches to lay their eggs.

Our local gill-net fishery, targeting on halibut, has been forced by state legislation to protect sea otters from entanglement, to fish in water too deep for a viable fishery.

Recreational fisheries have been affected likewise. Recreational fisheries for abalone, Pismo clam and crabs are minor remnants today.

In regard to sea lions and seals, depredation on troll caught salmon, trawl nets, set-nets, traps and longlines has escalated as pinniped populations have increased. It's not unusual for raiding sea lions and seals to take 15% to 25% of a fishermen's catch. On some occasions, depredation may affect 90% of the catch-leaving only skeletal remains. Sometimes only the bellies are eaten out of our hooked salmon. It's often a race to land a caught fish before a sea lion takes a bite out of it. Partially eaten fish are generally considered unmarketable. The same situation affects sportsmen.

Over the decades, our fishermen have shifted from fishery to fishery, in a futile attempt to adjust to marine mammal conflicts. However, in this age of limited entry, this is becoming virtually impossible. Our options are now few.

Our organization has a good track record in regards to cooperative efforts with government agencies attempting to identify solutions to marine mammal/fishery interactions. These efforts have included investigations into alternative fishing gear and improved practices for gillnetters. In recent years, our officers, directors and various members have worked with the California Department of Fish and Game, National Marine Fisheries Service, U.S. Fish and Wildlife Service, Marine Mammal Commission, and Sea Grant. We expect to continue these efforts.

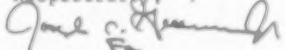
Unfortunately, we have often been frustrated by those who stress the letter of the law in regard to taking of marine mammals. Because of the prohibition on taking of depleted species, reasonable alternative gear experiments have remained untried. Month of workshops and studies and data collected by the mentioned government agencies has been little used because of threat of suit. Because of these threats of law suit, it has been difficult for the State of California to authorize experimental gear permits to test gear designed to reduce accidental take where depleted species are potentially involved.

We therefore, lend our support to those amendments to the Marine Mammal Protection Act which would allow the take of depleted and/or "de-facto" depleted species, as long as such take is part of a management program designed to promote recovery and maintenance of the stocks.

We also recommend a more enlightened view of optimum sustainable population (OSP). Viability of a stock seems a more important goal than the nebulous objective of OSP.

Thank you for your consideration.

Respectfully,



Fred Sears, President

POINT JUDITH FISHERMEN'S

Cooperative Ass'n., Inc.

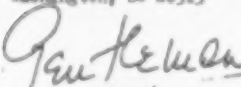
Box 730, Narragansett, R.I. 02882 • Tel. 401-783-3366

AN EQUAL OPPORTUNITY EMPLOYER

"The Freshest of Fresh Fish"

9 May 1968

Congressman Gerry E. Studds, Chairman
 Congressman Don Young, Vice Chairman
 Subcommittee on Fisheries and Wildlife Conservation and the Environment
 Committee on Merchant Marine and Fisheries
 House of Representatives
 Washington, DC 20515



Because East Coast marine mammal/fish interactions are quite different from those on the West Coast, our concerns for the Marine Mammal Protection Act reauthorization are also predictably different.

As you know, we have for several years been concerned about fishing vessel observers and user fee programs. The National Marine Fisheries Service has been discussing various ways to set up and implement programs for each of these, and the Coast Guard has tried for several years to come up with assorted programs which finally would allow them to charge fishermen fees for certain activities.

Increasingly restricted federal budgets mean that these two subjects may likely continue to be part of fisheries conservation and management discussions for some time to come. And because they have come up in the context of the MMPA reauthorization, we would like to reiterate some of our concerns here.

First, before any observer program were to be implemented in any fishery, the following conditions should have to have been met:

- the Council, working with others concerned about management in the region, should demonstrate that this program would be essential in the context of scientific information for management, information which clearly could only be gotten in this way;
- the federal government should be prepared to pay all the costs of this program;
- Congress must indemnify the vessel owner, for it has consistently come down to the fact that absent that, and regardless of the coverage otherwise, an observer may still sue a vessel owner; and

2

the program must be entirely voluntary to the vessel owner, and no vessel may be deprived the right to fish because he will not take an observer.

This does not mean that fishermen will not take observers. Over the years, many fishermen have indicated that they would be willing to have observers under certain circumstances, e.g., experimental gear. It is the insurance problems in the marketplace which have made many of them withdraw their offers --not, as some insisting on observers have alleged, a desire to violate laws or regulations. In some cases, fishermen might be willing to take observers if, in doing so, they could conclusively demonstrate points they wished to make.

Second, on the question of user fees: with the increasingly restricted federal funds which may be available for fisheries management, we are concerned that the administrative fee to process a permit application not be transmogrified into the funds to administer data processing under the program for which the permit is issued.

If we were to get into yet another discussion of user fees in the context of this reauthorization, we would prefer the look at Mr. Young's bill, HR 3341, the "Fisheries Research Funding Act," as a starting point for that discussion. If we must have user fees, let us first define clearly for what services the industry will pay them and ensure that those funds will only be used for those services.

Finally, on the question of permits, it is clear that our interactions with marine mammals are small to none. However, we have recently learned that foreign vessels involved in joint ventures on the East Coast have themselves taken mammals in the courses of their fishing operations. Because we would like to see joint ventures remain an option for fishermen in fisheries in which they would be appropriate, we would like to work with you to ensure that they do remain an option.

We look forward to working with you and the SCtt to improve the Marine Mammal Protection Act.

Thank you.

Yours sincerely,

Lucy Sloan
for James A. McCauley
President

Attachments: Comments, NMFS draft observer policy, 21 August 1987,
McCauley and Sloan

Column, "Take a close, involved look at user fees,"
McCauley, in Commercial Fisheries News, January 1988

cc: Congresswoman Claudine Schneider

POINT JUDITH FISHERMEN'S

Cooperative Ass'n., Inc.

Box 730, Narragansett, R.I. 02882 • Tel. 401-783-3368



AN EQUAL OPPORTUNITY EMPLOYER

21 August 1987

Richard B. Roe
Office of Fisheries Management (F/ML)
National Marine Fisheries Service
Washington, DC 20235

Re: Draft Domestic Observer Policy

Dear Dick:

We oppose the mandatory observer position in the NMFS Draft Observer Policy. And although we have a number of problems with this draft policy, because others, including the New England Council, have commented on various concerns we share, I will only outline some of the difficulties which the liability issue presents boatowners.

The insurance coverage on vessels varies on a case-by-case basis. P & I insurance may be at the \$250,000 total coverage level on smaller boats and run up to several million on larger vessels. The level of insurance is based on the level of protection the insured thinks he needs to protect his personal and/or corporate assets. He must also consider his exposure to liability that his operations pose based on historical data for his fishery or fisheries.

Assigning an observer to a vessel may jeopardize the protected position the owner has established through his insurance plan. The level of wages on a particular vessel usually determines the lifestyle that the crewman is likely to maintain. The liability insurance coverage, including maintenance and cure, is usually determined by the earnings of the crew.

An observer, on the other hand, may have a totally different income level. At present, the observer pay is in the \$250/day range. In some fisheries, that wage level may be compatible, but in most cases it far exceeds the crewman's expectations. The observer may also have a very different lifestyle and family obligations from those of the fisherman.

A fisherman and his family must accept certain risks as going with his job. As a result, in the event of injury, there is a good possibility that the boatowner and the fisherman can reach a reasonable settlement.

The observer, however, would be an unknown. A so-called reasonable settlement for an injured observer may well exceed the level of insurance a boatowner carries.

Because the observer would also be required to be added to the policy as a guest or some other designation other than a crewman in service to the vessel, he would not be in a position to collect maintenance automatically. And because the observer is not in service to the vessel, the boatowner would have to make a different and separate settlement from the maintenance for an injured crewman. The need to address the injury up front would greatly increase the possibility that any negotiation would take place with the observer's counsel present. A good chance for an extraordinary suit would begin with that, thereby jeopardizing the boatowner's livelihood.

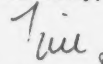
If there's a mandatory observer program established and then any vessel were excused from a mandatory observer requirement because of an inability to obtain adequate insurance, then all vessels should have the right to refuse on the same grounds.

I think, therefore, that the only viable option would be a voluntary observer policy. The boatowner/captain can then decide to take observers if he has adequate coverage or the capability to obtain that level of insurance. And it is unfair to deprive a man of his livelihood because he cannot afford what may well be prohibitively high premium levels.

To date, there has not been any language suggested that could be considered adequate to have the government provide indemnification from litigation brought against the vessel. To resolve this problem, there could be no exceptions to the indemnification; it must include gross negligence on the part of the boatowner/captain. Negligence can be made a factor in, or even the basis of, almost any claim if an observer's attorney think that will be the best way to win his client's suit.

Unless or until this liability problem is resolved, we will continue to oppose any mandatory observer program.

Sincerely,



James A. McCauley
President

cc: Congressman Studds
Congressman Young
National Council on Fishing Vessel Safety and Insurance
New England Fishery Management Council

LUCY SLOAN

Number 516
2424 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 554-3272; (202) 659-9833

21 August 1987

Richard B. Roe
Office of Fisheries Management (F/ML)
National Marine Fisheries Service
Washington, DC 20235

Re: Draft Domestic Observer Policy

Dick

As you know, I have had considerable difficulty with mandatory domestic observer programs for several years. I am no more enthralled with the current NMFS draft effort than I have been with earlier suggestions. But because I have participated extensively in the discussions which the New England Council and its Groundfish Ctte have had on this subject, and I share the concerns which they expressed in their letter, I wish simply to reiterate briefly some of the points I have made before on the record.

First, the problem of the liability with which a boatowner would be faced under a mandatory observer program remains unresolved. As Jay Johnson said to me in May 1984, it is still true that only Congress can indemnify our fishermen. And Congress has not yet done so. Until Congress does so, I and many others in the industry will continue to oppose mandatory observer programs. It is absurd to have observers for any purpose becoming the tail which wags the fishing industry dog in a market environment where boatowners may be unable to find insurance for observers at prices in line with what they pay for P&I.

Second, a corollary of the first, is the argument that observers are necessary for research purposes and that especially vessels seeking to participate in an experimental fishery must carry observers. The challenge, as yet unmet, is for the industry and the Councils to work out ways for these research needs to be met without observers or with voluntary observers. Over the years, many fishermen have indicated that they would be willing to have observers under certain circumstances, e.g., data gathering. It is the insurance problems in the marketplace which have made many of them withdraw their offers--not, as some insisting on observers have alleged, a desire to rape and pillage. It is not only counterproductive, but also unfair, to deprive a fisherman a right to use his considerable investment to earn a living and to experiment in ways which may increase his and others' flexibility on the fishing grounds.

*to which are, in some cases, already quite
adequate to the boatowner's
bottomline.*

Don Young's bill, HR 1887, the "Fisheries Research Promotion Act of 1987," is one vehicle, and Councils' FMP Cttes working with the industry is another, with which to explore further ways to collect data and to improve enforcement.

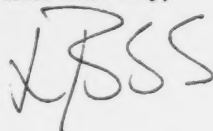
Third, as is the New England Council, I am concerned to ensure that Council staff have access to confidential data for FMP development, as Section 303(d) indicates.

Fourth, I am altogether underwhelmed by the biases in this draft policy for forms of management and the financing thereof (e.g., quotas and user fees) which the industry in New England and elsewhere have repeatedly rejected. The questions implicit in considerations of who directly benefits, how, and what that may mean are those with answers to which industry and NMFS often disagree.

If we can work out the liability problem and achieve industry-supported conservation and management measures, voluntary observers may be a quite useful resource on which to draw to improve data gathering of many different kinds. Until, however, the liability issue is resolved so the boatowner is not perpetually in jeopardy because of an observer, a strange creature who is not in service to the vessel, mandatory observers are out of the question.

Thank you.

Yours sincerely,



cc: Congressman Studds
Congressman Young
New England Fishery Management Council
National Council on Fishing Vessel Safety and Insurance

Has their time come?

Take a close, involved look at user fees

Is this the beginning? On Sept. 23, Representative Don Young of Alaska introduced a bill into the House entitled "Fisheries Research Funding Act of 1987 (HR 3341)."

The purpose of the bill is to strengthen fisheries research through the imposition of fees on the harvesting and processing of fish within the 200-mile exclusive economic zone (EEZ) and through licensing of recreational fishing within the EEZ.

We now have a user fee bill before us. The introduction of such a bill does not come as a surprise. The executive branch has sought user fees for Coast Guard services for several years, and the administration is now seeking someone in Congress to introduce its fee bill.

The Young research user fee bill may have a chance of passing. The license fees are reasonable and, when you think about the number of people and vessels involved, the dollars could add up.

I seldom support something like this, but this bill makes sense. After all, most of us have been paying much higher state license fees.

We all know there have been budget cuts for funding the management councils and the

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Box 730 Narragansett, RI 02882
401-783-3368



fisheries commissions. The

National Marine Fisheries Service (NMFS) is being especially hard hit. Federal cutbacks due soon will take a heavy toll on the operating budgets of all government agencies.

NMFS may not be able to stand much more in the way of cuts before it is unable to carry out even limited services effectively. Many valuable programs and experienced personnel are destined to be cut to meet the new proposed budget. The funds raised by HR 3341 could help stabilize the agency budget requirements in future years.

As a supporter of the fishery management council system, I have been concerned that the councils would be subjected to severe cuts, if not disbanded, unless a new source of funding

became available.

If this bill were to become law, we in industry would have to become much more involved in helping determine how money is spent. Although initial fees in the bill are modest, they set a precedent and could be increased if the money collected is not carefully administered. If we were to become increasingly and directly involved through paying user fees, we should also have more of a say in policy matters.

Fishermen are increasingly skeptical about the use of Salmon-Kennedy (S-K) funds for certain projects. No doubt the grants have been beneficial to the fishing industry, but it is hard for us to judge how cost-effective the programs are. The quality of the research conducted with S-K funding is uneven and has been

questioned, with good cause. If we are going to directly fund fisheries research through HR 3341, we must put the bureaucrats on notice that we demand the best and most for our money.

Other funding, including appropriations and S-K grants, is expected to be reduced over the next few years. Many fisheries-related organizations have become dependent on these funds. Direct industry support through a dues structure is essential for the continued existence of these organizations.

But the fishing industry, in most regions, has financial problems of its own. Predictably, there will be less individual financial support for organizations if user fees are instituted. Dues fall into a similar category as user fees - both are costs of doing business - and we should remember that we may have more control of the expenditures within an organization than we can have in government.

One fact stands out: the fishing industry can only support a limited level of activities. We must take an active role in determining how fisheries dollars are spent.

Jim McCauley

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 Tlx 89-2359 • Fax (202) 462-4507

May 24, 1988

The Honorable Gerry Studds
 Chairman, Subcommittee on Fisheries and Wildlife Conservation
 and the Environment
 543 House Annex II
 3rd and D Streets, SW
 Washington, DC 20515

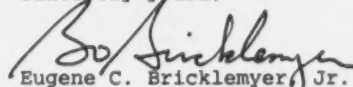
Dear Congressman Studds:

Enclosed please find a letter from Monitor on behalf of the MMPA Reauthorization Coalition. This is in response to a question on the sale of fur seal pelts raised by Representative Young during a colloquy in my testimony before your subcommittee on May 10. I have also taken the liberty of sending copies of this response to Mr. Young and to the members of your subcommittee and members of the National Ocean Policy Study.

To reiterate the position of the organizations endorsing the Monitor letter, we remain strongly opposed to commercialization of the subsistence fur seal hunt on the Pribilof Islands. We are, however, committed to using our best efforts to assist in moving St. Paul and St. George Islands away from a fur seal-dependent economy.

We appreciate the opportunity to supplement the record on this most important matter. Please contact me if I may provide further information.

Sincerely yours,


 Eugene C. Brickley, Jr.
 Counsel, Ocean Ecology

cc: The Honorable Donald A. Young
 Members, Subcommittee on Fisheries and Wildlife Conservation
 and the Environment
 Members, National Ocean Policy Study

ECBj/alm

R E C Y C L E D P A P E R



MONITOR

THE CONSERVATION, ENVIRONMENTAL
AND ANIMAL WELFARE CONSORTIUM

1506 19th St., N.W.
Washington, D.C. 20036

(202) 234-6576

May 23, 1988

The Honorable Donald A. Young
2331 Rayburn House Office Building
Washington, D.C. 20515-0201

Dear Congressman Young:

During May 10, 1988 testimony regarding the Marine Mammal Protection Act on behalf of the Marine Mammal Act Coalition of Animal Welfare and Environmental organizations, you asked Bo Bricklemeyer, as coalition coordinator, if our organizations could support a quota system allowing Aleut natives on the Pribilof Islands to sell skins from fur seals which have been taken during subsistence hunts held on those islands. At the time, Mr. Bricklemeyer indicated that the Coalition opposes any commercial sale of these skins beyond that already allowed by law, but he indicated that our organizations would evaluate the question. This letter presents a considered response to your proposal.

For the reasons stated below, our organizations remain strongly opposed to the commercial sale of North Pacific fur seal skins other than as already permitted. The idea of a quota does have theoretical appeal. The theoretical appeal of a quota is that, if one could identify a number of seal skins which is the same as or below the number of seals which would otherwise be taken for subsistence, there might be some rationale to permit commercial sale of these skins. However, the theoretical appeal of that logic is belied by the facts surrounding existing "subsistence" seal killing on the Pribilof Islands.

In 1985, the first year after which the International Fur Seal Convention had expired, the Aleut natives estimated a subsistence need of 15,000 seals, when they believed that seal pelts could be sold commercially. However, when it became apparent that seals could be taken only for subsistence purposes, natives on St. Paul Island killed only 3,384 seals. In short, when the illusion of commercial opportunity largely disappeared, the alleged "subsistence need" declined by nearly 80%. Developments since 1985 demonstrate further that the mere possibility of commercial gain increases seal

Congressman Young
May 23, 1988
Page Two

killing, and would affect any estimated quota.

On St. George Island, where commercial sealing ended long ago, and the for-profit native corporation appears not to have pursued a seal harvest, the demand for and use of seals has dropped dramatically from 608 (including unspoiled meat shipments from St. Paul) in 1985, to 124 in 1986, and then to 92 in 1987. Between 1985 and 1986, the same pattern, under many of the same influences, was apparent on St. Paul Island. In 1985, sealers were paid by the native corporation and 3,384 seals were killed. Considering discarded meat and seals sent to St. George, however, only 1,765 were actually used in 1985 on St. Paul. But, in 1986, under a "family-style" harvest where no funds were paid to kill seals, only 1,370 were killed.

These events stand in stark contrast to events on St. Paul Island in 1987 when islanders were apparently encouraged to believe that currently illegal commercial use might again be allowed. Indeed, in 1987, the native corporation hired St. Paul Islander's to kill seals, the corporation undertook to process and preserve the seal skins, and the possibility of later commercial pelt sales was being "talked-up". Under those conditions, seal kill increased to 1,710.

Other factors indicate that the increased kill in 1987 was due to the illusion of a future commercial opportunity. For example, while the number of seals killed on St. Paul went up, the percentage of seal meat taken from each seal to satisfy subsistence needs -- the rate of use -- decreased. Specifically, the rate of use early during the 1986 family-style harvest was 52 percent and overall use for 1986 was 47%. In 1987, however, the usage rate dropped to 41 percent. Moreover, during the 1986 "family-style" subsistence kill the natives killed smaller and younger seals, which yield more desirable meat, but in 1987 the paid seal killers took older, larger animals -- ones with less desirable meat but with pelts of higher commercial value.

Finally, during the 1986 "family-style" killings, seal pelts were generally not preserved. In 1987, St. Paul Island representatives began lobbying Congress and federal authorities for the right to sell skins from seals ostensibly killed for subsistence. With this in mind, a native corporation paid employees to kill seals, seal killing increased, commercially valuable seals were selected, and the

Congressman Young
May 23, 1988
Page Three

native corporation paid to have pelts processed and stored.

Given that the law does not presently permit commercial sale of seal pelts, the only readily apparent reason for this change in direction on St. Paul during 1987 was anticipated future economic benefits in the form of commercial sales. It would be a travesty for Congress to now retroactively permit skins from these seals to be sold.

Moreover, it is clear from the events since 1985, that if Congress permits any quota of skins to be sold in the future, Congress will only be encouraging that number of seals to be killed every year, regardless of subsistence needs. In other words, Congress would establish a floor below which alleged subsistence use would never fall. This in turn, would encourage renewed dependence by the Aleuts on revenue from commercial seal killing.

Renewed dependence on seals is included among the greatest dangers if restrictions on commercial sale of fur seal skins are relaxed. In the 1983 Fur Seal Act Amendments, Congress declared as a goal, reducing the Aleuts' economic dependence on commercial sealing, and appropriated millions of dollars to that end. When the Senate refrained from ratifying the International Fur Seal Convention in 1984, the most objectionable and destructive commercial sale of seal skins was prohibited. The figures since 1985 demonstrate that this prohibition has drastically reduced commercial kill, and tended to limit kill to that needed for true subsistence. This, in turn, has been associated with movement by the Aleuts toward alternative livelihoods (such as fishing). Yet, the figures since 1985 also demonstrate that even the illusion of a relaxation of the rules will only encourage unjustified commercial killing and a return to the dependencies of old. What is needed is a continued prohibition on further commercial use of seal skins.

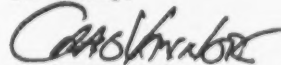
If Congress wants to provide additional dollars to help the Aleuts develop an alternative economy, it should appropriate additional funds to help the Aleuts develop alternative livelihoods. Such action has begun, to wit: in the 1989 House of Representatives appropriation, 3.9 million dollars are allocated to operational expenses and related activities on St. Paul Island. It would, however be counter-productive for the Congress to provide "aid" by encouraging Aleuts to re-enter the dead-end road of commercial seal killing and selling their skins.

Congressman Young
May 23, 1988
Page Four

Finally, you should be aware that even the on-site Alaska Regional office of the National Marine Fisheries Service (NMFS), strongly opposes any relaxation in the rules restricting the commercial use of seals killed for subsistence. Significantly, the NMFS office opposes relaxation of the rules because such action "would be completely unenforceable and would soon lead to wholesale killing of marine mammals for purely commercial reasons." For your information, we attach a copy of the memorandum from the NMFS in reference to this matter.

Mr. Young, we recognize that your proposal to allow a quota on the sale of seal skins is a sincere attempt to aid the Aleuts. However, for the reasons stated above, we must oppose the quota or any other proposal which would allow increased commercial use of fur seal skins. We urge you and your Congressional colleagues to do likewise.

Sincerely,



Craig Van Note
Executive Vice President

On Behalf of:

American Cetacean Society
American Humane Association
American Society for the Prevention of
Cruelty to Animals
Animal Protection Institute
California Marine Mammal Center
Center for Environmental Education
Cetacean Society International
Defenders of Wildlife
Earth Island Institute
Environmental Defense Fund
Friends of Animals
Friends of the Earth

continued

Congressman Young
May 23, 1988
Page Five

Friends of the Sea Otter
Fund for Animals
Greenpeace USA
The Humane Society of the United States
International Fund for Animal Welfare
International Wildlife Coalition
Massachusetts Society for the Prevention of
Cruelty to Animals
Monitor
National Alliance for Animal Legislation
North Wind Undersea Institute
Oceanic Society
Sierra Club
Sierra Club Legal Defense Fund
The Society for Animal Protective Legislation
Whale Center
Windstar Foundation



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

DATE: April 7, 1988

MEMORANDUM FOR: Fx1 - James E. Douglas, Jr.

FROM: F/ANKR - Robert W. McVey

SUBJECT: Testimony on Reauthorization of the Marine
Mammal Protection Act

We are concerned that the Alaska Region was not consulted during preparation of NMFS testimony on reauthorization of the Marine Mammal Protection Act. Although we have never been sent a copy of the entire document, we have obtained pages 6 and 7 ("Sale of Fur Seal Skins Taken in the Subsistence Harvest") and wish to indicate our uneasiness with the tone of that section.

As presently worded, this part of the testimony appears to indicate agency approval of the sale of raw skins. We feel strongly, that in practical terms it will be impossible for us to determine whether kills occurring in remote areas are being made for subsistence purposes or merely to provide skins for sale. Thus, such a change to the act would be completely unenforceable and would soon lead to wholesale killing of marine mammals for purely commercial reasons. Of equal concern is the probability that such an amendment could jeopardize the Native handicraft industry in Alaska. Sale of raw skins to non-Natives would quickly lead to competing handicraft markets and could drive out many of the more marginally competent Native artisans.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

Office of Legislative Affairs

August 11, 1988

Honorable Gerry Studds
Chairman
Subcommittee on Fisheries and
Wildlife Conservation and the
Environment
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Studds:

We are pleased to respond to your questions resulting from the
May 10, 1988 hearing on Marine Mammal Protection Act
Reauthorization.

If you, or your staff, require additional information, please let
me know.

Sincerely,

B. Kent Burton
B. Kent Burton
Director

Enclosure



QUESTIONS AND ANSWERS FOR THE RECORD
IN FOLLOWUP TO THE HEARING ON
MMPA REAUTHORIZATION
ON MAY 10, 1988
BEFORE THE
SUBCOMMITTEE ON FISHERIES AND
WILDLIFE CONSERVATION AND THE
ENVIRONMENT

Questions From Congressman Studds

Question 1:

In 1984, Congress amended the MMPA to require that each foreign nation involved in harvesting tuna with purse seines in the eastern tropical Pacific Ocean provide documented evidence to the United States that it has a) adopted regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States, and that b) the average rate of incidental take by its vessels is comparable to that of U. S. vessels. Failure to meet these standards requires the Secretary of the Treasury to ban the importation of commercial fish or products from that foreign nation. This requirement became effective July 17, 1984.

On May 21, 1986, the National Marine Fisheries Service announced its decision that Mexico was in "substantial compliance" with the MMPA and lifted the MMPA tuna importation ban that had been imposed in 1981.

a. What was the mortality level of porpoise in Mexico's purse seine operations at the time the embargo was lifted? How did Mexico's mortality level compare with the mortality level in the U. S. fleet? How do the mortality levels of the two fleets compare now? How did the mortality levels compare at the time the 1984 amendments to the MMPA became law?

b. Please provide the 1984 porpoise mortality level of the tuna fleet of each nation that exports yellowfin tuna to the U.S., the present mortality level of these fleets, and the mortality level NMFS believes will meet the requirements of comparability standard mandated in the 1984 amendments to the MMPA.

c. At the hearing Mr. Fullerton noted that "We started in 1984 to require the (tuna producing) nations to adopt (tuna-porpoise) regulations, but not to meet the requirements of comparability as far as kill-per-ton. And that's the reason we embargoed Mexico in 1986." What were the specific circumstances under which Mexico was embargoed in 1986?

ANSWER: (a) A tuna embargo against Mexico imposed in 1980 under the Magnuson Act following that nation's seizure of a U.S. tuna vessel. A similar prohibition was imposed under the Marine Mammal Protection Act (MMPA) shortly thereafter when Mexico failed to submit documentation required under that Act. The MMPA embargo was removed in 1986. In their submission, Mexico reported a total of 877 porpoise were killed in 1984. The U.S. mortality that year was 14,400. The two estimates are not comparable because U.S. mortality figures are estimated from U.S. observer reports while Mexico's was apparently based upon interviews with skippers and/or logbook inspections. The NMFS does not accept logbooks or vessel skipper interviews as acceptable sources for porpoise mortality estimates. In response to the other questions, NMFS will be able to make a comparison of mortality between the Mexico fleet and the U.S. fleet for 1986 and 1987 by early September of this year. A comparison of the mortality rates for 1988 will not be available until September, 1989.

(b) The NMFS did not require the submission of mortality data for individual nations exporting yellowfin tuna to the U.S. in 1984 and it would be difficult to obtain because few non-U.S. tuna purse seine vessels carried observers that year. An estimate of total mortality for all non-U.S. nations tuna purse seine fishing on porpoise in the eastern Pacific in 1984 is 15,018. The preliminary mortality estimate for the non-U.S. fleet in 1987

is 101,036 porpoise. Data sufficient to estimate mortality on a nation-by-nation basis for 1986 and 1987, will be submitted by August 1988 by each nation purse seine fishing in the eastern Pacific that plans to import tuna into the U.S. It would be difficult at this time to determine the mortality level that would be comparable to the U.S. mortality as the MMPA requires NMFS to make a rate comparison and not establish or calculate a nation-by-nation or overall mortality level. To be determined to be comparable, nations with large fleets (e.g., Mexico and Venezuela) must achieve a mortality rate no more than 25% greater than the U.S. rate by the 1990 fishing year. Nations with small tuna fleets must be no more than 75% greater than the U.S. rate by 1990. Because the U.S. rate fluctuates greatly from year to year, it is difficult to project future mortality levels. Because our methodology for calculating mortality comparability is quite detailed, a copy of our March 1988 interim final rulemaking on this subject is attached.

(c) The embargo against Mexico was imposed in 1980 under the Magnuson Act following the seizure of a U.S. tuna vessel. A similar prohibition was imposed under the MMPA shortly thereafter when Mexico failed to submit documentation required under that Act. The MMPA embargo was removed in 1986 following a request by the Government of Mexico for a determination that Mexico was tuna purse seine fishing on schools of porpoise in conformance with the MMPA. At that time, the Assistant Administrator determined

that Mexico's regulatory program and their participation in the Inter-American Tropical Tuna Commission's (IATTC) porpoise observer program was sufficient to be found in substantial conformance with the MMPA. The Assistant Administrator also noted that the finding would remain in effect only until the new tuna importation regulations became effective, which was expected to take place within the next 60 days. The new regulations (which were published in March 1988) were to implement the 1984 amendments to the MMPA and require nations to achieve comparability with the U.S. kill rate.

Question 2:

The 1981 amendments to the MMPA require NOAA to undertake a program of research into new methods of locating and catching tuna without the incidental taking of marine mammals. Testimony submitted for the record of the hearing by Greenpeace noted that despite this clear mandate, "the ensuing years have been devoid of research and development of alternative fishing methods". Is that an accurate characterization?

ANSWER: Between 1980 and 1983, the fishing industry, Hubbs Research Institute, and the NMFS investigated the feasibility of using hydrophones to locate tuna schools not associated with porpoise. The technique did not appear feasible and no further investigation was pursued.

In 1986, the NMFS convened a group of experts to consider alternatives to purse seining on porpoise. The participants considered three general areas of investigation: 1) modification of existing gear, 2) separating tuna from dolphin prior to setting purse seines, and 3) innovative technology.

The consensus of the group was that too little was known about the dynamics of the tuna/dolphin bond to expect that methods could be developed to separate the tuna from the dolphins prior to setting a net. The NMFS is continuing to collect data through its observer program that will aid in our understanding of this relationship.

Three innovative technologies were discussed as alternative approaches to purse seining: 1) fish aggregating devices (FADs), 2) longline fishing, and 3) use of sonar to locate tuna not associated with dolphins. The potential use of FAD's remains under review. Other alternatives were considered unacceptable because they created an economic disadvantage for the U.S. fleet and they were either a less efficient method or were too costly. The working group concluded there would be little benefit in pursuing these alternatives and that the most productive area of investigation would be to continue modifying existing gear and methods. Gear modifications have contributed to the reduction in porpoise mortality to current levels. The group concluded that use of lights to illuminate the backdown channel in sundown sets was reducing mortality, and this requirement was added to our domestic regulations in July 1986. Additional modifications to the webbing below the porpoise safety panel were identified as a possible area for investigation. NOAA will continue to investigate new methods and gear technology improvements as they are identified.

Question 3:

Greenpeace notes in its testimony that it has heard that recent estimates made by the NMFS place the current population of northern offshore spotted dolphins at 900,000 to 1 million animals, and that the maximum replacement yield of this stock would optimistically be at 40,000 animals.

- a. Are these figures accurate?
- b. How many of these animals can legally be taken by the U.S. and foreign fleets combined, pursuant to the statutory quota and the interim regulations issued on March 18, 1988?
- c. How well would the quota serve to protect this stock, if both the U.S. and the foreign fleets took their allowable limits?

ANSWER: (a) The estimate of 900,000 to 1 million northern offshore spotted dolphins is correct for the 1986 estimate of relative abundance reported from the results of the first years research cruise; preliminary indications from the 1987 cruise suggest that the relative abundance estimate is higher than the previous year's estimate. The basis of the estimate cited by Greenpeace indicating a maximum replacement yield of 40,000 animals is presumed to be derived from an annual replacement yield of 4 percent times the estimated one million northern offshore spotted dolphin. The accuracy of these data will be determined at the completion of NMFS's five year research survey.

(b) The U.S. quota for all species, including the northern offshore spotted dolphin, is 20,500 animals. Individual stock quotas are based on 50% of the 1979 estimated maximum replacement yield of that stock. This approach allows U.S. fishermen flexibility to tailor their fishing strategies to variations in

the availability and location of yellowfin tuna without surrendering unfair advantage to the foreign fleet which is not subject to strict stock quotas. Because 50% of the replacement yield for northern offshore spotted dolphin was calculated in 1981 to be 42,898 and because that number is significantly greater than the overall quota of 20,500, that latter number also became the individual stock quota for northern offshore spotted dolphin.

There is no foreign quota in the interim regulations since the 1984 amendment requires a kill rate comparability standard to be used to control the level of foreign dolphin mortality. (See response to question 1.b. above). Estimates for non-U.S. mortality and mortality rates for 1986 and 1987 will be available in mid- to late-August.

(c) While there is no combined allowable limit (either overall or by porpoise stock) for U.S. and non-U.S. tuna fleets, the U.S. quota in combination with a comparable mortality rate for non-U.S. fleets, should serve to protect both the northern offshore spotted stock and the other stocks until NOAA completes its five-year trends and abundance assessment. As long as the combine U.S. and non-U.S. mortality level of the northern offshore spotted stock (or any other stock), does not exceed its annual replacement yield (calculated in 1979 to be 85,796), the population with either remain at its present level or increase in

size. The U.S. has not exceeded its 20,500 quota for northern offshore spotted dolphin since it was established in 1980 (the highest mortality was in 1986, 13,721). IATTC estimates for the mortality for the International Fleet (including the U.S.) for 1986 is 65,117. This is for both northern and southern offshore spotted dolphin. The 1987 estimates should be available in August.

Question 4:

The fishing industry and the environmentalists submitted to the Committee their proposal for amendments to the MMPA, which called for the placement of 35 observers on U.S. vessels in the west coast fisheries. At the hearing, Lee Alverson, representing the fishing industry, estimated that the placement of the observers would cost between \$2 million and \$2.5 million. What is your estimate of the cost of the observer coverage called for in the proposal?

ANSWER: The fishing industry's estimate of \$2.5 million is reasonable for their estimated placement of 35 observers. However, NOAA believes that the lists of species and fisheries covered by the proposal need to be expanded. The cost of an observer program will depend on the number of observers required to cover all appropriate fisheries. We are developing an expanded list of species and fisheries which might be covered, including certain East Coast fisheries. Once this list is compiled, we will have a better estimate of what an observer program will cost.

32.503-6 and/or recommending nonaward of potential contracts.

(8) *Notice of disapproval.* (i) If, within 45 days after receipt of the notice of deficiency (see paragraph (b) (4) of this section) or a reasonable extension thereto, the contractor has neither submitted an acceptable corrective action plan nor corrected significant deficiencies, all or a selected portion(s) of the contractor's estimating system shall be disapproved in writing. The notice of disapproval shall identify the cost element(s) covered by the disapproval and list the deficiencies which prompted the disapproval for each affected cost element.

(ii) A copy of the Notice of Disapproval shall be sent to the cognizant auditor and to each contracting office and contract administration office having substantial business with the contractor.

(9) *Withdrawal of estimating system disapproval.* After the ACO determines that the contractor has corrected the significant system deficiencies, the ACO shall notify the contractor, the auditor, and all affected contracting activities that the disapproval has been withdrawn.

215.811-79 Contract clause.

The contracting officer shall insert the clause at 252.215-7003 in all solicitations and contracts to be awarded on the basis of certified cost or pricing data.

PART 242—CONTRACT ADMINISTRATION

3. Section 242.302 is amended by adding paragraph (S-75) to read as follows:

242.302 Contract administration functions.

(S-75) Review contracting estimating systems.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 252.215-7003 is added to read as follows:

252.215-7003 Cost estimating system requirements.

As prescribed in 215.811-79, insert the following clause.

Cost Estimating System Requirements (May 1988)

(a) *Definition.* "Estimating System" is a term used to describe a contractor's policies, procedures and practices for generating cost estimates which forecast costs based on information that is available at the time. It includes the organizational structure; established lines of authority, duties, and

responsibilities; internal controls and managerial reviews; flow of work; coordination, and communication; and estimating methods, techniques,

accumulation of historical costs, and analyses used by a contractor to generate estimates of costs and other data included in proposals submitted in the expectation of receiving contract awards.

(b) *General.* The Contractor shall have an estimating system that consistently produces well supported proposals that are an acceptable basis for negotiation of fair and reasonable prices. The estimating system should be consistent with and integrated with the Contractor's related management systems and subject to applicable financial control systems.

(c) *Applicability.* Paragraphs (d) and (e) are also applicable if the Contractor is a large business and, in its fiscal year preceding award of this contract, received Department of Defense (DoD) prime contractors or subcontracts thereunder totaling fifty million dollars (\$50 million) or more for which certified cost or pricing data were required. This clause is also applicable if the Contractor is a large business which, in its fiscal year preceding award of this contract, received Department of Defense (DoD) prime contracts or subcontracts thereunder totaling ten million dollars (\$10 million) or more for which certified cost or pricing data were required, and during performance of this contract the Contracting Officer notifies the Contractor in writing that paragraphs (d) and (e) of this clause apply.

(d) *System requirements.* The Contractor shall establish and maintain an estimating system in compliance with subsection 215.811-74 of the DoD FAR Supplement.

(i) The Contractor shall disclose its estimating system to the Contracting Officer responsible for contract administration (ACO) in writing. If the Contractor wishes the Government to protect such information as privileged or confidential, an appropriate legend should be placed on the face of the document(s) at the time of submission. An estimating system disclosure is adequate when the Contractor has provided the ACO with documentation which (i) accurately describes those policies, procedures and practices that the Contractor currently uses in preparing cost proposals; and (ii) provides sufficient detail for the Government to reasonably make an informed judgment regarding the adequacy of the Contractor's estimating practices.

(2) Significant changes to the cost estimating system must be disclosed to the ACO on a timely basis.

(3) The Contractor shall comply with its disclosed estimating system.

(e) *Estimating system deficiencies.* (1) If during the period of performance of this contract, the Contractor receives a report of the review of its estimating system which identifies deficiencies in the system, the Contractor agrees to respond as follows:

(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall, within thirty (30) days of receipt of such report, indicate its agreement in writing; and within (60) days of receipt of such report, correct any identified

deficiencies or submit a corrective action plan showing proposed milestones and actions leading to elimination of the deficiencies.

(ii) If the Contractor disagrees with the report findings and recommendations, the Contractor shall respond in writing within thirty (30) days of receipt of the report, indicating its rationale for each area of disagreement.

(2) The ACO shall evaluate the Contractor's response to the report and notify the Contractor of his/her determination concerning any remaining deficiencies and/or the adequacy of any proposed or completed corrective action(s).

(End of clause)

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 60224-7282]

Regulations Governing the Importation of Tuna Taken in Association With Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Interim final rule with request for comments.

SUMMARY: NMFS issues this interim final rule in response to a 1984 amendment to the Marine Mammal Protection Act (MMPA). The rule amends marine mammal regulations regarding the importation of yellowfin tuna caught with purse seines in the eastern tropical Pacific Ocean (ETP).

Under this rule, any nation wishing to export yellowfin tuna to the United States that has purse seine vessels in the ETP must satisfy a two-part test that requires: (1) Documentary evidence that the nation has adopted a regulatory program governing the incidental taking of marine mammals in the fishery that is comparable to the program of the United States, and (2) documentation that the average rate of incidental mortality of marine mammals in the fishery by its vessels is comparable to the rate of incidental mortality of marine mammals from fishing by the U.S. fleet.

DATE: This rule is effective April 18, 1988. Comments on the rule must be submitted no later than May 17, 1988.

ADDRESS: Comments should be addressed to the Assistant Administrator for Fisheries, National

Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, DC 20235. An Environmental Assessment/Regulatory Impact Review is available upon request.

FOR FURTHER INFORMATION CONTACT: E.C. Fullerton (Director, Southwest Region, NMFS), 213 514-6196; or Nancy Foster (Director, Office of Protected Resources and Habitat Programs, NMFS), 202-673-5355.

SUPPLEMENTARY INFORMATION: Background

NMFS issued a proposed rule on August 13, 1985 (51 FR 28963), to amend 50 CFR 216.24 to modify the importation requirements for yellowfin tuna caught in association with marine mammals in foreign purse seine vessels in the ETP. As a result of comments received on the proposed rule, modifications and clarifications have been made to the rule.

Accordingly, the rule is being published as an interim final rule with a 60-day comment period. The regulatory procedures adopted in this rule are based on the best information available to NMFS at this time and represent a prudent approach to saving marine mammals. However, NMFS does not want the regulatory procedures adopted here to frustrate the purpose of the 1984 amendment and this regulation, that of saving marine mammals. In particular, NMFS wants to encourage foreign nations to comply with these regulations by implementing comparable programs and working to reduce their kill rates, rather than cause them to seek tuna markets outside the United States, thus frustrating U.S. efforts to reduce the total marine mammal kill by all nations. Furthermore, NMFS recognizes that changing conditions in the tuna industry, and the development of new and effective basic equipment and techniques for saving marine mammals, may necessitate re-evaluation of these regulations in the future. Therefore, NMFS invites comments from other Federal agencies, the public and foreign governments on this interim final rule. In particular, NMFS invites comments on the criteria set forth in this notice for determining comparability of regulatory program and kill rate, and their possible effects on the development of improved techniques and equipment.

Regulations governing the taking of marine mammals incidental to commercial fishing operations appear at 50 CFR Part 216. Included in these regulations are provisions concerning the importation of yellowfin tuna and

tuna products from nations whose vessels participate in the yellowfin tuna purse seine fishery in the ETP. Effective January 1, 1978, these importation provisions made the importation of yellowfin tuna and tuna products from nations known to be involved in the ETP fishery contingent upon certain findings by the Assistant Administrator for Fisheries, NOAA (Assistant Administrator). Under § 216.24(e)(5)(i), the Assistant Administrator must find (a) that the fishing operations of the nation concerned * * * are conducted in conformance with U.S. regulations and standards * * * or (b) that * * * "although not in conformance with these regulations, such fishing is accomplished in a manner which does not result in an incidental mortality and serious injury in excess of that which results from U.S. fishing operations under these regulations." These findings are subject to an annual review in which the information items listed in 50 CFR 216.24 (e)(5)(ii) are updated for the previous calendar year.

Since 1978, 18 nations in addition to the United States have purse seined in the ETP. Currently, findings are in effect for the following countries: the Cayman Islands, Costa Rica, Ecuador, Mexico, Panama, Spain, Vanuatu, and Venezuela. The Congo, El Salvador, Mexico, Peru, Senegal, and the Union of Soviet Socialist Republics (U.S.S.R.) have been prohibited from exporting yellowfin tuna to the United States during some period of time under these regulations. The Congo, Peru, and Senegal subsequently removed their fleets from the ETP. El Salvador and the U.S.S.R. do not have findings and therefore cannot export yellowfin tuna to the United States. Bermuda, Canada, the Republic of Korea, Nicaragua, and New Zealand have not purse seined in the ETP in recent years. Additional information can be found at 51 FR 18644, May 21 1986; 50 FR 3950, January 29, 1985; 48 FR 56968, December 27, 1983; 48 FR 30422, July 1, 1983; 48 FR 14431, April 4, 1983; 47 FR 11307, March 16, 1982; and, 46 FR 10974, February 5, 1981.

The most recent information available indicates that the active purse seine fleets with vessels of over 400 tons carrying capacity for nations currently with findings are as follows:

Nation	Number of vessels
Cayman Islands	1
Costa Rica	1
Ecuador	4
Mexico	43

Nation	Number of vessels
Panama	1
Spain	2
Vanuatu	4
Venezuela	15

¹ As of December 31, 1986.

Non-U.S. fleets have substantially increased their fishing for yellowfin tuna associated with marine mammals in the ETP since 1984. The Inter-American Tropical Tuna Commission (IATTC) estimated that non-U.S. vessels harvested 398,000 short tons (st) of yellowfin tuna on marine mammals during 1979-86, an average of about 49,750 st per year. The non-U.S. fleets are estimated to have taken 45,700 st of yellowfin tuna in marine mammal sets in 1984 and 109,800 st in 1985. Preliminary 1986 estimates indicate that the total yellowfin tuna catch by all vessels (including U.S. vessels) in the IATTC Yellowfin Tuna Regulatory Area (CYRA) was about 253,200 st, which is up from 142,300 st in 1984 and 217,000 st in 1985. The highest catch year on record for these species in the CYRA was 1986. The estimated total fleet capacity in 1986 was 122,900 st, which was a slight reduction from 129,500 st in 1985.

Nations with findings accounted for 194,882 st or 66 percent of all yellowfin tuna caught in the ETP during 1986. Mexico caught 59 percent of this amount, or 114,070 st. Other major nations catching ETP yellowfin tuna included Venezuela and Ecuador. Of the total amount of yellowfin tuna caught in the ETP by nations with findings during 1986, 24 percent, or 40,722 st, was imported into the United States fresh or frozen for use by domestic canneries. The estimated value of this product was approximately \$37 million. Imports from Venezuela comprised the largest share of ETP yellowfin tuna, representing 35 percent of the total amount. Other major suppliers included Ecuador (19 percent) and Mexico (7 percent). Other nations with findings collectively accounted for 39 percent of the total ETP yellowfin tuna imported by U.S. canneries. Much of this amount was transshipped from Panama to U.S. canners in Puerto Rico.

With the exception of Mexico, nations with findings were very dependent upon the United States in 1986 as a market source for ETP-caught yellowfin tuna. Fifty-three percent of the yellowfin tuna caught in the ETP by Venezuelan vessels was imported into the United States by domestic canners in 1986. The value of this product was approximately \$14 million. Twenty-six percent of all Ecuadorian-caught ETP yellowfin tuna

was imported by U.S. canneries. Only 3 percent of the Mexican-caught ETP yellowfin tuna was imported by the United States during 1986 due to Mexico's strong European market for yellowfin tuna. Sixty-three percent of the ETP yellowfin tuna caught by all other countries was imported by U.S. canneries during 1986. These countries include the Cayman Islands, Panama, Spain and Vanuatu.

Canned tuna from ETP fishing nations amounted to 11,517 st, only 4 percent of all canned tuna imported into the United States. The amount of yellowfin tuna actually caught in the ETP, canned by nations with findings, and later imported into the United States is estimated to be very small but cannot be traced due to the present U.S. Customs importation classification system.

Public Law 98-364

On July 17, 1984, the President signed into law an act (Pub. L. 98-364) reauthorizing and amending the MMPA. One amendment is to ensure that each nation exporting yellowfin tuna to the United States has in place a regulatory program for the protection of marine mammals that is comparable to the program of the United States. It further requires documentation that the average rate of incidental taking of marine mammals by vessels of the harvesting nation in the ETP tuna fishery is comparable to that of the United States.

The House Committee on Merchant Marine and Fisheries noted that the regulatory program of the United States is quite extensive and detailed (see H.R. Report 98-754, p. 8). The Committee in reporting this legislation stated that it does not intend to require that the regulatory program of foreign countries be identical to that of the United States. Programs that require the basic equipment and techniques used to protect marine mammals and have as their purpose the minimization of the number of animals incidentally taken would be comparable as long as they provided a level of protection substantially equivalent to that of the U.S. program. Similarly, the Committee recognized that the average rate of incidental taking will vary from year to year. The Committee stated that it did not intend for the importation of tuna products to be banned from a nation if the rate of incidental taking is slightly higher in any given year. However, it added that the report of levels or rates of incidental mortality being consistently higher than those of the United States or significantly higher in any given year should result in the prohibition of imports.

Several important points must be made in this context. First, the statute clearly requires the Secretary of Commerce to evaluate performance on a country-by-country basis. Second, the Congress indicated that NMFS should continue to encourage nations which have not already done so to implement observer programs either on their own or in cooperation with the IATTC. Third, the Congress intended that NMFS require estimates of incidental take that are equivalent in accuracy and reliability to observer data obtained in the U.S. and IATTC observer programs. In summary, the Congress expects that the importation regulations will result in demonstrable evidence that those nations which have purse seine fishing vessels in the ETP and want to export yellowfin tuna to the United States have effective programs to prevent or reduce marine mammal mortality.

Comments and Responses

A proposed rule was published on August 13, 1986 (51 FR 28963), for public review and comment. NMFS received seven letters of comment on the proposed rule. Three letters were from or on behalf of national or local environmental organizations, two were from U.S. Government entities and two were from the tuna industry. A summary of the comments received and the NMFS response to those comments are as follows:

1. *Comment:* Several commenters expressed concern that the proposed regulations will not lessen high incidental mortality rates by foreign vessels. The commenters strongly recommended that a nation should have gear and procedure requirements comparable to U.S. industry or prove the effectiveness of the system in use.

Response: NMFS concurs. The Guidelines for Comparable Regulatory Programs and Mortality Rates have been amended to describe what NMFS considers as minimum gear and procedural requirements to be accepted as comparable to the U.S. industry.

2. *Comment:* Several commenters suggested that the consequences of not having a comparable observer program should be more clearly defined.

Response: NMFS agrees and has modified the Guidelines for Comparable Regulatory Programs and Mortality Rates to require participation in an approved observer program and to identify an annual observer coverage goal of 33 percent for individual harvesting nations. The consequence for a nation not meeting this goal could be a negative finding by the Assistant Administrator if it is determined that the

data submitted are not sufficient to make a finding of conformance.

3. *Comment:* Several commenters suggested that area fished and stock composition be considered in comparing the average rate of incidental marine mammal mortality between U.S. and foreign fleets.

Response: NMFS acknowledges that incidental marine mammal mortality varies by stock and geographic area. Based on recent summarized data available from IATTC, three distinct geographic areas have been established in the regulations for comparing U.S. and foreign marine mammal mortality rates. The distribution and behavior of the common dolphin were found to be sufficiently different from other marine mammal stocks that mortality data also will be requested separately for comparability purposes.

4. *Comment:* Four commenters suggested that the 50 percent criterion for comparing incidental mortalities between U.S. and foreign fleets be reviewed, because it appeared to be too high.

Response: NMFS has made substantial modifications to the criterion for determining comparability rates of incidental mortality of marine mammals. These modifications are designed to demonstrate firmness in U.S. efforts to achieve comparability between U.S. and foreign fleets in reducing marine mammal mortality without precluding foreign cooperation in saving marine mammals by issuing criteria so stringent that nations will seek tuna markets outside the United States, thus circumventing U.S. efforts to reduce the total marine mammal mortality by all nations.

The revised criterion for determining comparability establishes the average number of marine mammals killed per ton of tuna caught in sets made on marine mammals over a five-year period or for the most recent year, whichever is lower, as the measure of performance for U.S. and foreign fleets. Comparability will be evaluated annually by geographic area, separating data on common dolphin sets from all other marine mammal species. Details of the system are provided later in this preamble.

5. *Comments:* One commenter recommended that the reference to "incidental mortality" be amended to "incidental take."

NMFS has chosen to use the rate of kill as the standard for the rate comparison test, and not to use other types of "takings" like chase, encirclement, or capture. This decision is supported by the fact that virtually

the entire focus of the domestic regulatory program in practice is "kill", and the yearly quota used for monitoring and controlling the fishery established first by regulation and now by statute is in terms of "kill". Although studies are underway on the effects of chase, encirclement, and capture, the application of these "takings" to the rate comparison test is premature. When or if restrictions on these types of "takings" are sufficiently supported by scientific evidence to be meaningfully incorporated into the domestic regulatory program then their use in the comparison test would be appropriate.

8. Comment: One commenter questioned our preference for "kill-per-ton" over "kill-per-set" for making mortality rate comparability determinations.

Response: Although the proposed rule would have used both "kill-per-ton" and "kill-per-set" rates, NMFS has concluded that the use of marine mammals killed per ton of yellowfin tuna is the best single rate to use in the comparability test implemented in these regulations. Because species groups and area of catch are factored into the comparison test along with the kill rate, NMFS has determined that the complications of using both kill-per-set and kill-per-ton in addition to these other factors is not warranted. Although kill-per-set is useful for some purposes, NMFS has concluded that kill-per-ton is a better rate for comparison test purposes because it takes into consideration the performance of vessels for any given amount of yellowfin tuna caught. This rate best focuses foreign countries on the desirable result of minimizing marine mammal kill for any given amount of catch of yellowfin tuna.

7. Comment: Two commenters expressed concern that the regulations would encourage nations to market their tuna products outside the United States because of difficulties in obtaining detailed tuna/marine mammal data from foreign nations and, in some instances, enacting acceptable statutes to meet U.S. requirements.

Response: The statute requires that this regulatory system be established. NMFS has selected only the most relevant data requirements which are known to be available and necessary to make a finding.

NMFS recognizes the difficulties encountered by certain nations in enacting acceptable statutes to meet the finding requirement when the vessels operating under their flags are under charter to another nation whose vessels operate under statutes already approved by the United States. To accommodate

these rare situations, provision has been made to consider foreign vessels chartered in another country to be operating under the laws of that nation. A definition for certified charter vessel has been added in the regulation for this purpose.

8. Comment: Several commenters questioned why alternative programs could not be used as a management tool. Multi-regional cooperative programs and foreign quotas on incidental take were specific suggestions as alternatives to the proposed regulation.

Response: The 1984 amendments to the statute mandate that each nation is to be examined separately for comparability with the U.S. performance and programs.

Interim Final Rule

This interim final rule implements a performance-based import certification program consistent in basic structure and in principle with the marine mammal protection program for U.S. vessels which take marine mammals incidental to yellowfin tuna while purse seine fishing. This certification program is a new approach, the elements of which may be modified by NMFS as new information becomes available and experience demonstrates better ways to achieve lower mortality.

A two-part test will be used each year to determine whether to grant or extend a finding of conformance for any individual nation. This test applies to any nation that has a vessel or a certified charter vessel of 400 tons carrying capacity or greater that fishes for tuna in the ETP. This is consistent with U.S. regulations and recognizes that smaller vessels cannot effectively set on marine mammals. First, each nation must be found to have a regulatory program to protect marine mammals that is comparable to the U.S. program. The annual evaluation of the regulatory program will consider the comparability of laws, regulations, and guidelines which govern the gear and techniques which each nation's vessels must use to prevent or minimize marine mammal mortality when purse seining for yellowfin tuna associated with marine mammals. Second, the effectiveness of each nation's regulatory program will be assessed by monitoring the nation's annual marine mammal kill rate. Each nation must demonstrate, using reliable and verifiable data, that the average annual rate of incidental mortality of marine mammals per ton of yellowfin tuna taken with marine mammals from fishing vessels operating under its laws is comparable to the incidental rate of marine mammal mortality achieved by U.S. vessels

fishing in the same geographic area and in association with the same species groups. For purposes of this test, the two species groups considered are common dolphins and all other marine mammal species. The Comparable Regulatory Program test will be applied immediately and the kill rate test will be applied in 1991 when adequate data are available to allow a meaningful comparison to be made, as explained below.

Initial Certification

An existing finding of conformance will continue in effect until a determination (either positive or negative) is made on a new request for a finding under these new regulations, if the request and documentation are submitted within 120 days from the effective date of these regulations and if the application as submitted is complete. Findings for nations not submitting the required documentation will expire 180 days after the effective date of these regulations. Any nation that does not have an existing finding of conformance but has one or more vessels of 400 tons carrying capacity or greater using purse seine gear in the ETP that desires to export yellowfin tuna or yellowfin tuna products to the United States must submit documentation to support a finding at least 120 days prior to the date it wishes to commence exportation of yellowfin tuna.

The Assistant Administrator will review each nation's submission for completeness and will assess each nation's described regulatory program for comparability with the U.S. program. Additional information may be requested from the nation before issuing an affirmative finding. An affirmative finding for this test is likely to be issued if the program contains provisions similar to those in the guidelines that follow. Copies of the relevant U.S. regulations have been provided to all interested nations. Each nation's submission must contain sufficient detail so that the Assistant Administrator will be able to determine that the nation's regulatory program is comparable in substance and effectiveness to the U.S. program. At a minimum, the documentation for an initial finding must contain:

1. A description of gear and procedural requirements, including copies of relevant laws, guidelines, and implementing regulations, and the enforcement program designed to reduce or prevent the incidental mortality and injury of marine mammals in purse seine fishing by its vessels;

2. A description of the observer program by which the incidental mortality of marine mammals is monitored and by which annual species mortality and fleet mortality rates are estimated. If the nation is not participating in the IATTC observer program but is conducting an independent observer program, the nation must provide details regarding the number and percentage of trips covered, training requirements for observers, the data collected by observers, and the agency to contact for additional information;

3. A description of the methods used to identify problems and solutions to improve the performance of individual fishermen in reducing incidental mortality and how fishermen will be advised (e.g., through technical experts or a peer advisory group);

4. A list of the purse seine vessels of 400 short tons carrying capacity or greater (i.e., IATTC Category 6 vessels) in the nation's fleet which operated in the ETP in 1986 or 1987, or both; the status of each vessel during 1986 and 1987 (e.g., actively fishing in the ETP, actively fishing in other waters, or inactive); and the expected status during 1988 of the above vessel(s) and all other purse seine vessels expected to operate in the ETP in 1988.

5. Data on the performance of the nation's purse seine vessels (including certified charter vessels) operating in the ETP for either or both of the previous two fishing years (1986-1987) including:

a. Total number of tons of yellowfin tuna observed caught in each fishing area by purse seine sets on:

1. Common dolphin and

2. All other marine mammal species;

b. Total number of marine mammals observed killed in each area by purse seine sets on:

1. Common dolphin and

2. All other marine mammal species;

c. Number of observed trips and number of observed purse seine sets on marine mammals by the nation's purse seine fleet during the year;

d. Total number of vessel trips and total number of purse seine sets on marine mammals by the nation's purse seine fleet during the year; and

e. The number of observed purse seine sets in which more than 15 marine mammals were killed.

The information requested in 5 a-c, and 5e refers to information obtained by observers on the tuna vessels. For purposes of the information requested above, a purse seine set on common dolphins is one in which more than 50 percent of the marine mammals captured are common dolphins.

These data must be provided by geographic area and for two species groups, common dolphin and all other marine mammals. A mortality of 15 animals or more in a set is used to identify problem sets that require special attention by the nation to analyze skipper performance or the effectiveness of fishing techniques to avoid future mortalities from similar causes.

Guidelines for Comparable Regulatory Programs and Mortality Rates

Documentation submitted annually by a nation must show that certain minimum requirements have been met in order to satisfy the two-part test for comparability.

Comparable Regulatory Program Test

1. Marine mammal rescue gear, equipment and procedural requirements and guidelines.

At a minimum, the gear and procedural requirements must include the installation and use of a superapron or fine mesh system in the purse seine net, a backdown procedure, the availability of speedboats with towing bridges to hold open nets, the availability of a raft to aid live animals after backdown, a prohibition on brailling and sacking up live animals from the net and the installation and use during darkness of a lighting system capable of illuminating the backdown channel with at least 140,000 lumens. Sets on pure schools of eastern spinner dolphin and on pure schools of any other species of marine mammals except offshore spotted dolphin stocks, striped dolphin species, and common dolphin species must be prohibited.

2. An observer program to monitor the effectiveness of marine mammal rescue gear and procedures and to record the incidental mortality and serious injury of marine mammals associated with fishing.

To be comparable with the U.S. observer program, a nation must participate in an observer program with a goal of 33 percent observer coverage on trips involving fishing on tuna associated with marine mammals. This could be achieved by an individual nation placing a qualified technical observer aboard its vessels on every third trip or on a regional basis by nations participating in the IATTC observer program. If a program's observer coverage falls below 33 percent, the nation must explain the cause of the problem and how it will be rectified in the future. Observer coverage consistently below 33 percent or drastically below 33 percent in any one year would be a basis for finding

that the program is not comparable to that of the United States.

3. An advisory group to identify problems and solutions to improve the performance of individual fishermen in reducing incidental marine mammal mortality.

A panel of expert captains is a peer advisory group established by the U.S. industry to review and improve individual skipper performance. A similar peer advisory group established by an individual nation or on a regional basis would be considered comparable, as would an advisory group of technical experts.

Comparable Mortality Rate Test

The ultimate goal for comparability is to attain foreign marine mammal mortality rates (kill-per-ton) at least as low as those of the United States. However, after reviewing the limited kill-rate summary data for the aggregate foreign tuna fleet, it was found that the current kill rate may be up to four times higher than the U.S. rate. Based on this starting rate, it was determined that, as an interim step, kill rate comparisons should not be used as a basis for a negative finding until 1991. This allows nations time to gather adequate data to allow the United States to make a meaningful comparison, and to work with their skippers to reduce their kill rates.

NMFS will monitor the annual kill-per-ton rate through 1990 by species and fishing area. During this period, nations will be expected to maintain a negative trend in their kill-per-ton rates to assure that effective regulatory programs are being conducted and that rates comparable with the United States will be attained at the end of the interim period. A negative trend will be assessed by fitting a statistical regression line to the annual kill-per-ton rates for the years 1986-90, and determining the slope of the line. If the U.S. kill-per-ton rate increases during this period, however, the kill-per-ton rate for foreign nations can increase in proportion to the U.S. rate.

However, beginning with the 1988 data, if the annual kill-per-ton rate for any nation does not decline, or increases more than the U.S. rate increases, the Assistant Administrator will issue a negative finding unless, after a review of the nation's explanation of the causes and actions taken, the Assistant Administrator determines that actions taken or being taken are likely to reduce marine mammal mortality in the future. In conducting the review, the Assistant Administrator will request specific details concerning the actions

taken to identify and counsel any skippers whose performance is unsatisfactory and to handle any other specific factors causing high mortality.

NMFS decided that this phase-in period was appropriate because it would encourage foreign nations to comply with these regulations by implementing comparable programs and working to reduce their kill rates, rather than cause them to seek tuna markets outside the United States, thus frustrating U.S. efforts to reduce total marine mammal kill by all nations.

The rates of marine mammal mortality (kill-per-ton) estimated from extensive observer data have varied significantly for the U.S. fleet since 1979 in each fishing area. We assume that the foreign kill rate will also vary significantly from year to year. To reduce this variability, NMFS will use a five year running average for kill rate comparison if adequate data for the five year period exists. This will provide a larger data base for use in the analysis. Most nations with current findings were participating in an adequate observer program by 1980. Therefore, during the interim period of 1986 through 1990, most countries could gather 5 years of data. If a country does not have five years of adequate data by 1990 or when they apply for a certification after 1990, NMFS will use the information from those years for which the country has adequate data. If a nation's kill rate for the most recent year is lower than the multi-year average, the nation can use that for comparison. This, however, should not be interpreted as allowing a nation to have high mortality rates for four years, and then by meeting the comparability test in the last year, that importation will necessarily be allowed. It should be remembered that nations must also achieve a negative trend in its kill rate during the first five year period, absent an explanation acceptable to NMFS.

There are significant differences in mortality rates in three different areas of the ETP. These areas are the major inshore area (Area 1) and offshore area (Area 2) fished by all nations, and all other areas fished (Area 3). Also, the marine mammal kill rate in sets on common dolphin is significantly greater than the kill rate from sets on all other species. NMFS has decided that these differences should be accounted for in applying the kill rate test. This would result in a fairer and more accurate comparison than a simple comparison of rates without considering the effect of area and species differences upon mortality. Therefore, before comparing a foreign kill rate with the U.S. kill rate,

NMFS will weight the U.S. kill rate according to the amount of tuna that the foreign nation caught in the three different areas and on the two different species groups, as shown in the example below.

The United States will have more confidence in an estimate of a nation's kill rate if that nation has observer data from at least 5 trips and 100 sets per year. Conversely, we will have less confidence in data derived from less than 5 trips and 100 sets. Because of the uncertainty of estimates of kill and the small numbers of porpoise involved in the fisheries of nations with small fleets, we will use a less stringent test for these nations. If a nation's kill rate is derived from data from at least 5 trips and 100 sets per year, that nation's kill rate may be no more than 25 percent higher than the comparable U.S. kill rate to receive a positive finding for the kill rate test. If the kill rate is derived from data from fewer than 5 trips and 100 sets per year, the nation must have a kill rate that is no more than 75 percent greater than the comparable U.S. kill rate to receive a positive finding on the kill rate test.

Summary and Example: The comparable mortality rate test consists of comparing a nation's average mortality rate to the average mortality rate of the United States which is weighted to account for dissimilar amounts of fishing activity between the United States and the foreign nation in three discrete fishing areas and for two groupings of species. The foreign rate is then adjusted by an allowable 25 percent or 75 percent depending upon the number of trips and sets in a year. The foreign nation's average mortality rate using the most recent year of data, or the average of all of the data available from the last five years, whichever is lower, will be used to compare with the same time period of the U.S. data.

Formulas Used To Calculate Foreign and U.S. Mortality Rates

The mortality rate (dolphins killed/ton yellowfin caught) for each foreign nation (R_f) is calculated using data stratified by year, species grouping and area as

$$R_f = \frac{\sum_{i=1}^m \sum_{j=1}^2 \sum_{k=1}^3 M_{ijk}}{\sum_{i=1}^m \sum_{j=1}^2 \sum_{k=1}^3 C_{ijk}}$$

where M_{ijk} equals the number of dolphins killed during year i , of species group j and in area k and C_{ijk} is the tons of yellowfin tuna caught during year i ,

on species group j and in area k . Note that m equals 1 if only the most recent year's data are used and equals 5 if the five-year running average is used.

The weighted average mortality rate for the U.S. fleet is calculated by weighting the U.S. rate by the proportion of the total yellowfin tuna caught by the foreign nation that was caught in each year, on each species grouping, and in each area. The U.S. weighted average (R_{us}) is calculated as:

$$R_{us} = (1/C \dots) \left[\sum_{i=1}^m \sum_{j=1}^2 \sum_{k=1}^3 (K_{ijk}/T_{ijk}) C_{ijk} \right]$$

where K_{ijk} equals the number of dolphins killed by the United States fleet during year i , of species grouping j and in area k and T_{ijk} equals the tons of yellowfin caught by the U.S. fleet during year i , on species grouping j and in area k . C_{ijk} equals the tons of yellowfin tuna caught by the foreign nation during year i , on species grouping j , and in area k and $C \dots$ is the total catch of the foreign nation for all years, species groupings, and areas combined.

Finally, the U.S. rate (R_{us}) is multiplied by 1.25 if the foreign nation has completed more than 5 observed trips and made more than 100 observed sets or by 1.75 if it has completed less than 5 trips or made less than 100 observed sets. If the foreign nation's rate is less than or equal to the U.S. rate then they have met the mortality rate test standard.

Example: To simplify this hypothetical example, we will assume that nation X has chosen to use only the most recent year (or the only year data was collected). During the year, nation X has completed 6 observed trips and made 250 observed sets on dolphins. Dolphin mortality and yellowfin catch during dolphin sets for nation X and the United States during the most recent year are presented in Table 1.

1. Nation X Rate (hypothetical)

$$R_x = \frac{(1000 + 800 + 0 + 600 + 9000 + 2500)}{(1000 + 500 + 0 + 2000 + 21000 + 6000)}$$

$$= 9900/30500$$

$$= 0.325$$

2. United States Rate (hypothetical)

$$R_{us} = (1/30500) [(200/500)1000 + (600/1800)500 + (100/400)0 + (25/200)2000 + (6000/20000)21000 + (2000/6000)6000]$$

$$= (400 + 166.667 + 0 + 250 + 6300 + 2000)/30500$$

$$= 0.399$$

3. Comparison of Nation X and United States Rates (hypothetical)
Nation X rate = 0.325

U.S. rate (R_{us}) $\times 1.25 = 0.299 \times 1.25 = 0.374$
Therefore, because Nation X's rate is less than the adjusted U.S. rate, it will

be eligible to export yellowfin tuna to the United States.

TABLE 1. NUMBER OF DOLPHINS KILLED AND YELLOWFIN TUNA CAUGHT BY NATION X AND THE UNITED STATES DURING THE MOST RECENT FISHING YEAR, ON COMMON AND ALL OTHER SPECIES, AND IN THREE FISHING AREAS

(Hypothetical example)

Area	Common dolphin sets		All other sets		Total catch
	Mortality (animals)	Catch (tons)	Mortality (animals)	Catch (tons)	
Nation X:					
1	1,000	1,000	600	2,000	
2	800	500	5,000	21,000	
3	0	0	2,500	6,000	
Total		1,500		29,000	30,500
United States:					
1	200	500	25	200	
2	800	1,800	6,000	20,000	
3	100	400	2,000	6,000	

Annual Review

Commencing in July 1989, the Assistant Administrator will annually review all existing findings. The Assistant Administrator will require that each nation submit an annual report by July 31 of each year if it desires an extension of an affirmative finding for the following year. This date was chosen because the annual IATTC information is generally available in early July. This annual report will update the information in the original submission as well as provide data on the performance by its vessels during the previous year. The annual report will include the following:

1. Any changes in the gear, equipment or procedural requirements (including copies of relevant laws, regulations, guidelines, etc.) governing incidental taking of marine mammals by the nation's ETP purse seine vessels;

2. Any changes in the number of vessels, names of vessels or status of vessels on the vessel list submitted previously;

3. Actions (e.g., participation in IATTC workshops) taken by the nation in the past year to reduce or prevent marine mammal mortality and serious injury associated with fishing by its vessels; and,

4. Data on the performance of the nation's purse seine vessels (including certified charter vessels) operating in the ETP for the previous fishing year including:

a. Total number of tons of yellowfin tuna observed caught in each fishing area by purse seine sets on:

1. Common dolphin and
2. All other marine mammal species;

b. Total number of marine mammals observed killed in each area by purse seine sets on:

1. Common dolphin and
2. All other of marine mammal species;

c. Number of observed trips and number of observed purse seine sets on marine mammals by the nation's purse seine fleet during the year;

d. Total number of vessel trips and total number of purse seine sets on marine mammals by the nation's purse seine fleet during the year; and

e. The number of observed purse seine sets in which more than 15 marine mammals were killed.

The annual report must describe in detail the method used to obtain these data. In this context, NMFS recognizes the role filled by IATTC in collecting data on incidental marine mammal mortality through its international observer program and in estimating total mortality associated with U.S. and non-U.S. fishing. The IATTC observer program is comparable to the U.S. observer program and, as now constituted, provides reliable data to estimate total mortality and rates of mortality for vessels from participating nations. These data and resulting estimates represent the best scientific information available for the purposes of these regulations and will be used to monitor mortality in the fishery. Data obtained through participation in the IATTC program and submitted to the Assistant Administrator by the nation requesting certification or by IATTC on behalf of a nation requesting certification will be accepted.

However, a nation is not required to participate in the IATTC program in order to provide acceptable data. A

nation may establish its own program or participate in a program like that of IATTC. A nation not participating in the IATTC observer program must provide sufficient information on the observer training and the sampling methodology used in the program in order to demonstrate that any data submitted are of comparable accuracy and reliability. The adequacy of the observer training and observer coverage of such a program will be determined by a scientific review conducted by NMFS in consultation with other scientific experts.

The first annual report will be due July 31, 1989, to cover fishing during the 1988 fishing year.

The Assistant Administrator will review each report carefully to decide whether to extend or terminate a finding under this program. A nation's finding will terminate on December 31 of any year unless the Assistant Administrator receives a complete annual report, determines that the nation's program and kill rates are comparable, and publishes his finding for the following year in the Federal Register. Every year the Assistant Administrator will determine whether the nation's program is comparable to that of the United States. In 1989, the Assistant Administrator will also review the kill rate trend as described earlier in the preamble. In 1991, the Assistant Administrator will review the program and the kill rate as described earlier, to determine if both the regulatory program and the kill rate are comparable to those of the United States.

The Assistant Administrator will review the performance of the U.S. fleet by July 1 each year to establish its revised five-year baseline performance

level and supporting data that will be used to determine the comparability for each nation for its subsequent year's finding. The revised five-year baseline data will include: the proportion of sets made on marine mammals associated with high mortality sets (more than 15 porpoises killed) and separate computations for the kill-per-ton of common dolphin and for all other marine mammals for each fishing area.

The current five-year average kill-per-ton will be computed using the most recent year's data submitted by the foreign nation which will be added to that nation's four previous years of data to determine whether the new average kill-per-ton rate is within 25 percent or 75 percent, whichever is appropriate, of the weighted U.S. rate for the same years.

In future years, the general procedure will be to receive annual estimates of marine mammal mortality by species and stocks; to receive annual reports with detailed program information and fleet data, to assess these annual reports so that the Assistant Administrator can determine whether each nation's marine mammal regulatory program and kill rate continue to be comparable to the U.S. program and kill rate, and to announce findings at least 60 days before the start of each new calendar year.

Modifications to the Proposed Rule

In addition to those changes to the proposed rule discussed in detail in the preamble above (i.e. 5-year baseline data gathering period; 25/75 percent mortality rate comparability test; and 3 fishing area—2 species designations) the following modifications to the proposed rule have been made in the interim final rule:

1. Definitions for "certified charter vessel" and "kill-per-ton" have been added to 50 CFR 216.3. The proposed definition for "ETP" has been modified to designate 3 distinct fishing areas.
2. Modifies Tariff Schedule Numbers to reflect changes made by U.S. Customs Service.
3. Does not adopt the proposal to eliminate the Yellowfin Tuna Certificate of Origin (SF 370-1) because it was determined that the necessary documentation was not obtainable elsewhere. The form was however, simplified. The required information items from the form have been added to the rule. The interim final rule eliminates the bill of lading requirement because information is now on the Yellowfin Tuna Certificate of Origin.
4. Places responsibility for monitoring, enforcement and data reporting for

certified charter vessels to the nation which charts the vessel(s).

5. Clarifies that mortality rate data must be submitted from vessels with observers. Nations are to submit the observed data, rather than extrapolate from the observed data to an overall kill-per-ton rate.

6. Requires that data submitted for calculating mortality rates must be authentic and accurate.

Confidentiality

All data submitted by foreign nations in compliance with this rule will be kept confidential as allowed by U.S. law. Generally, this means that the data will be made available to the public only in aggregated form.

Classification

The Assistant Administrator has determined that the modifications to the regulations being made at 50 CFR 216.24(e) will not have a significant impact on the human environment. NMFS has prepared an environmental assessment (EA) on the modification. The finding of that EA was that no significant impact on the human environment will occur as a result of this rule and that no environmental impact statement was required. The EA is available upon request (see ADDRESS).

The Administrator of NOAA has determined that this rule is not a major rule requiring a regulatory impact analysis under Executive Order 12291. The estimated economic impact of ETP yellowfin tuna import prohibitions, if any, could be expected to result in a short-term, slightly positive benefit to U.S. fishermen and a short-term, slightly negative impact on tuna processors if affirmative findings are not made for nations now exporting ETP yellowfin tuna to U.S. processors. The impact would depend upon the number of nations embargoed and the amount of yellowfin tuna normally provided by the nation(s). This impact would exist until such time as any reduction in imports is made up by exports from other areas of the world, especially from the western Pacific nations which are not affected by this action or by non-embargoed ETP nations. NMFS prepared a regulatory impact review as part of its EA which concluded that this rule will not result in (1) an annual major increase in costs or prices for consumers, individual industries or government agencies; (2) an annual effect on the economy of \$100 million or more; or (3) significant adverse effect on competition, employment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export

markets. However, if more stringent rules are adopted and/or all ETP fishing nations are unable to qualify to export yellowfin tuna to the United States, it was determined that up to 47,000 st of yellowfin tuna valued at approximately \$37 million could be lost to U.S. processors. Such a loss of imported tuna would represent about 24 percent of U.S. production. A copy of the review is available upon request (see ADDRESS).

The General Counsel of the Department of Commerce has certified to the Small Business Administration that the proposed modification to the regulations will not have a significant economic impact on a substantial number of small entities. As noted above, more stringent regulations likely would adversely affect the single remaining tuna canning plant in California and the tuna processing facilities in Puerto Rico and American Samoa. These facilities are by definition not small businesses. They would also affect an unknown number of import-export businesses and support industries. The impact on these industries is believed to be insignificant since lightmeat tuna, especially the canned product, is available world-wide and alternate markets are readily available if some ETP sources became unavailable. As a result, a regulatory flexibility analysis was not prepared.

This rule contains collections of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). The collections which are subject to the Act are found at 50 CFR 216.24(e) (3) and (4) and have been approved by the Office of Management and Budget under OMB Control Number 0648-0040.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12512.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Imports, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Date: March 14, 1988.

James E. Douglas, Jr.,
Deputy Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR Part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for Part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.

2. Section 216.3 is amended by adding in alphabetical order five new definitions, one for "certified charter vessel," one for "ETP," one for "harvesting nation," one for "purse seine set on common dolphins" and one for "kill-per-ton," to read as follows:

§ 216.3 Definitions.

"Certified charter vessel" means a fishing vessel of a non-U.S. flag nation, which is operating under the jurisdiction of the marine mammal laws and regulations of another, harvesting, nation by a formal declaration entered into by mutual agreement of the nations.

"ETP" means the eastern tropical Pacific Ocean which includes the Pacific Ocean area bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastlines of North, Central and South America.

"ETP Fishing Area 1" means the northern coastal portion of the ETP east of 117° W. longitude and north of 5° N. latitude.

"ETP Fishing Area 2" means the offshore area south of 14° N. latitude, north of 6° N. latitude, east of 150° W. longitude, and west of 123° W. longitude.

"ETP Fishing Area 3" means all other areas within the ETP not included in Fishing Areas 1 and 2.

"Harvesting nation" means the country under whose flag one or more fishing vessels are documented, or which has by formal declaration agreed to assert jurisdiction over one or more certified charter vessels, from which vessel(s) fish are caught that are a part of any cargo or shipment of fish to be imported into the United States, regardless of any intervening transshipments.

"Purse seine set on common dolphins" means a purse seine set in which more than 50 percent of the marine mammals captured are common dolphins.

"Kill-per-ton" means the number of small toothed cetacean marine mammals killed per ton of yellowfin tuna caught in sets made on marine mammals.

3. Section 216.24 is amended by revising paragraphs (e) (1), (2), (3), (4), and (5) to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations.

(e) *Importation.* (1) It is illegal to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if such fish have been caught with commercial fishing technology that results in the incidental kill or incidental serious injury of marine mammals in excess of that allowed under this part for U.S. fishermen.

(2) The following fish and categories of fish, which the Assistant Administrator has determined may be involved with commercial fishing operations which cause the death or injury of marine mammals, are subject to the requirements of this subsection:

(i) *Yellowfin tuna.* The following U.S. Tariff Schedule Item Numbers identify the categories of tuna and tuna products under which yellowfin tuna is imported into the United States and which are subject to the restrictions of paragraphs (e)(3) and (e)(5) of this section:

- 110.10-25 Tuna: yellowfin, whole fish
- 110.10-25 Tuna: yellowfin, eviscerated, head on
- 110.10-30 Tuna: yellowfin, eviscerated, head off
- 110.10-37 Tuna: yellowfin, other
- 112.30-40 Tuna: canned, other than white meat, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator
- 112.34-20 Tuna: canned, other, no oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator
- 112.90-00 Tuna: canned, other, in oil—except cans marked as other than yellowfin tuna in a manner approved in advance by the Assistant Administrator
- 113.56-65 Tuna: other, not in oil, prepared or preserved—except shipments of loins and discs marked other than yellowfin tuna in a manner approved in advance by the Assistant Administrator.

(ii) *Salmon and halibut.* The following U.S. Tariff Schedule Item Numbers identify the categories of salmon and halibut products which are imported into the United States and are subject to the restrictions of paragraph (e)(4) of this section:

- 110.20-25 Halibut, fresh or chilled
- 110.20-30 Halibut, frozen
- 110.20-45 Salmon, fresh or chilled
- 110.10-50 Salmon, frozen
- 110.70-40 Halibut, other—except portion controlled steaks
- 111.48-00 Salmon, salted
- 111.88-00 Salmon, smoked or kippered
- 112.18-00 Salmon, preserved, not in oil

(3) *Yellowfin tuna.* (i) All shipments of tuna and tuna products listed in paragraph (e)(2)(i) of this section, from any nation, may not be imported into the United States unless a finding required in paragraph (e)(5) of this section has been made and unless accompanied by

a separate Yellowfin Tuna Certificate of Origin (Standard Form 370-1).

(ii) The Yellowfin Tuna Certificate of Origin must include the following information:

- (A) Country of registry of the fishing vessels involved;
- (B) Nation under whose laws a certified charter vessel is operating;
- (C) Exporter (name and address);
- (D) Consignee (name and address);
- (E) Identity and quantity of the tuna to be imported, listed by U.S. Tariff Schedule Number;
- (F) Name of vessel(s) which caught the yellowfin tuna;
- (G) Other documentation as may be required by the Assistant Administrator, subsequent to granting a finding in paragraph (e)(5) of this section; and
- (H) A declaration signed either by a responsible government official of the country whose flag vessel or certified charter vessel caught the fish, the owner's representative, or the vessel master which states: "I certify that the above information is complete, true and correct to the best of my knowledge and belief."

(4) *Salmon and halibut.* All shipments of fish and fish products listed in paragraph (e)(2)(ii) of this section, from any nation, may not be imported into the United States unless the following conditions are met:

(i) The shipment is accompanied by a commercial invoice and/or a bill of lading indicating the following:

- (A) Nation of registry of the fishing vessel(s) involved;
- (B) Exporter (name and address);
- (C) Consignee (name and address);
- (D) Identity and quantity of the fish or fish products to be imported; and

(ii) The shipment is accompanied by a statement by a responsible official of the harvesting nation or the master of the vessel which caught the fish that such fish were not caught in a manner prohibited for U.S. fishermen by these regulations. The statement will identify the species, quantity, and exporter of the fish to which the statement refers, and be submitted at the time of importation; or

(iii) A responsible official of the harvesting nation may certify to the Assistant Administrator that all of its flag vessels are fishing in conformance with these regulations or that the fishing technology practiced by the harvesting nation with respect to the species of fish presented for importation into the United States does not result in deaths to marine mammals in excess of that which results from U.S. commercial fishing operations as prescribed by these regulations. Upon receipt of a

statement of conformance, the Assistant Administrator may then make a finding, and publish such finding in the Federal Register, that fish imports listed in paragraph (e)(2)(iii) of this section from the nation were not caught with commercial fishing technology which results in the incidental kill of marine mammals in excess of U.S. standards.

(5) *Yellowfin tuna.* (i) Any tuna or tuna products in the classifications listed in paragraph (e)(2)(i) of this section, from nations whose flag vessels and certified charter vessels of 400 tons carrying capacity or greater operate in the ETP tuna purse seine fishery, as determined by the Assistant Administrator, may not be imported into the United States unless the Assistant Administrator makes a finding in consultation with the U.S. Department of State and publishes the finding in the Federal Register that:

(A) The government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to the regulatory program of the United States; and

(B) The average rate of that incidental mortality by the vessels of the harvesting nation is determined comparable to the average rate of incidental mortality of marine mammals by U.S. vessels in the course of such harvesting. Upon such a finding, unloading will be allowed for the period of validity specified in the finding.

(ii) A harvesting nation which desires an initial finding under these regulations that will allow it to export to the United States those products listed in paragraph (e)(2)(i) of this section must submit by appropriate government official to the Assistant Administrator the information listed below 120 days before that nation wants to begin exportation of yellowfin tuna to the United States. The required information follows.

(A) A detailed description of the nation's regulatory and enforcement program governing incidental taking of marine mammals in the purse seine fishery for yellowfin tuna, including:

(1) A description, with copies of relevant laws, implementing regulations and guidelines, of the gear and procedures required in the fishery to protect marine mammals;

(2) A detailed description of the method (e.g., international or national observer records) by which the incidental mortality of marine mammals will be monitored; and

(3) A description of the methods used to identify problems and solutions to improve the performance of individual

fishermen in reducing incidental mortality and how they will be advised.

(B) A list of its vessels and any certified charter vessels of 400 tons carrying capacity and greater which purse seine for yellowfin tuna at any time during the preceding two years in the ETP, indicating the status of each such vessel during that two year period (i.e. actively fishing in ETP, fishing in other waters; in port for repairs; inactive) and the status of each vessel expected to operate in the ETP in the year in which the submission is made.

(C) The best available data for the 1986 calendar year and any subsequent calendar year on the performance of its purse seine vessels (including certified charter vessels) fishing for tuna associated with marine mammals within the ETP including the following:

(1) Total number of tons of yellowfin tuna observed caught in each fishing area by purse seine sets on:

(i) Common dolphin and
(ii) All other marine mammal species;
(2) Total number of marine mammals observed killed in each area by purse seine sets on:

(i) Common dolphin and
(ii) All other marine mammal species;
(3) Number of observed trips and number of observed purse seine sets on marine mammals by the nation's purse seine fleet during the year;

(4) Total number of vessel trips and total number of purse seine sets on marine mammals by the nation's purse seine fleet during the year; and

(5) The number of observed purse seine sets in which more than 15 marine mammals were killed.

(D) A description of the source of the data requested in paragraph (e)(5)(ii)(C) of this section and, if from other than the Inter-American Tropical Tuna Commission, a description of the method used to obtain data on marine mammal mortality by species/stocks in sufficient detail to certify the authenticity and accuracy of the data.

(iii) The Assistant Administrator's determination on a nation's initial finding will be announced within 120 days of receipt of the information described in paragraph (e)(5)(ii) of this section and will be published in the Federal Register. A finding will be valid only for the calendar year for which it was issued.

(iv) A harvesting nation for which a positive finding under this section is in effect may request a renewal of such a finding for the subsequent calendar year by submitting, by the appropriate government official, to the Assistant Administrator the following information either by July 31 of the current year or for nations participating in the IATTC

observer program, 14 days after the date the IATTC releases data on porpoise mortality, whichever is later:

(A) A description (with copies of relevant new laws, regulations and guidelines) of any changes in the regulatory program of that nation governing incidental taking of marine mammals in the yellowfin tuna purse seine fishery by its vessels and any certified charter vessels;

(B) Any changes in the number, names or status of vessels on the nation's list of vessels and certified charter vessels which may be involved in the taking of marine mammals incidental to yellowfin tuna purse seining in the following year;

(C) Data required by paragraph (e)(5)(ii)(C) of this section for the preceding fishing year. A nation will be required to submit vessel performance data on any vessels leaving its fleet for that portion of the year that the vessel operated under its flag or as a certified charter vessel;

(D) A description of the actions taken by the nation in the previous year to achieve greater reductions in marine mammal mortality incidental to purse seining by its vessels or any certified charter vessels; and

(E) A statement of the source of the data requested in paragraph (e)(5)(ii)(C) of this section and, if from other than the Inter-American Tropical Tuna Commission, a description of the method used to obtain data on marine mammal mortality by species/stocks in sufficient detail to certify the authenticity and accuracy of the data.

(v)(A) The Assistant Administrator will make a positive finding or renew a positive finding for a harvesting nation if:

(1) The harvesting nation has provided all information required by paragraphs (e)(5)(ii) or (e)(5)(iv) of this section;

(2) The nation's regulatory program is comparable to the regulatory program of the United States as described in paragraphs (a), (b), (c), (d)(2), and (f) of this section;

(3) The data on marine mammal mortality submitted by the harvesting nation are determined to be accurate; and

(4) The average kill-per-ton rate for the longest period of time for which data are available, up to 5 years, or for the most recent year, whichever is lower, does not exceed the U.S. kill-per-ton rate for the same period by the amount specified in paragraph (e)(5)(v)(D) of this section below.

(B) During an initial five-year baseline period (1986-90), the Assistant Administrator will not make a negative

finding based on the kill-per-ton rate because adequate data are not available. However, the annual kill-per-ton rate for nations must demonstrate a negative trend in order for a nation to retain a positive finding. A negative trend will be assessed by fitting a line to the annual kill-per-ton rates for the years after 1985 and determining the slope of the line. If the U.S. kill-per-ton rate increases during this period, the rate for harvesting nations can increase in proportion to the U.S. rate. However, if the annual kill-per-ton rate for any nation does not decline or remain proportional with any increase in the U.S. rate, after 1988 the Assistant Administrator will issue a negative finding unless, after a review of the nation's explanation of the causes and actions taken, the Assistant Administrator determines that the actions taken are likely to sustain a reduction of marine mammal mortality in the future. In conducting the review, the Assistant Administrator will request specific details concerning the actions taken to identify and counsel individual skippers whose performance is unsatisfactory and to handle any other specific factors causing the high mortality rates.

(C)(7) After 1990, those harvesting nations having purse seine vessels of

400 tons carrying capacity or greater that harvest yellowfin tuna in the ETP and whose vessels have observer data for at least five (5) trips and 100 sets per year must have an average mortality rate which is no more than 25 percent greater than the U.S. average.

(2) Harvesting nations having purse seine vessels of 400 tons carrying capacity or greater that harvest yellowfin tuna in the ETP and whose vessels have observer data for fewer than five (5) trips and 100 sets per year are recognized as likely to experience greater variation in their kill-per-ton rates due to the small number of sets observed during a year. These nations must have an average mortality rate which is no more than 75 percent greater than the U.S. average.

(D) A nation's average mortality rate will be compared with the U.S. mortality rate which is weighted to account for dissimilar amounts of fishing activities between the two nations in the three ETP fishing areas and for the two species groups.

(E) The Assistant Administrator will consider an explanation of special circumstances, submitted by a harvesting nation with a request for a finding, describing reasons and actions taken to mitigate marginal performance

and unusually high rates of marine mammal mortality.

(vi) The Assistant Administrator may require verification of statements made in connection with requests to allow importations. The Assistant Administrator may reconsider a finding upon a request from and the submission of additional information by the harvesting nation.

(vii)(A) Any finding in effect on the date the interim final rule becomes effective will terminate without further notice 180 days after that date unless the Assistant Administrator has received within 120 days of that date a valid, signed and substantially complete application for a new finding in which case the existing finding will remain in effect until the Assistant Administrator's decision is announced.

(B) The time limits specified in paragraphs (e)(5)(ii) and (iii) of this section do not apply to a harvesting nation that applies in a timely manner for a new finding under paragraph (e)(5)(vii)(A) of this section.

(C) Paragraph (e)(5)(vii) of this section is effective only until September 1, 1989.

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